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In the

# Supreme Court of the United States

October Term, 1940

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No. _____

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[redacted]

Petitioners,

vs.

[redacted]

Respondent.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petition of [redacted] respectfully shows:

## OPINIONS BELOW

The opinion of the District Court (R. 396) is reported at 67 Supp. 911.

The opinion of the Court of Appeals (R. 484) is reported at 170 F. 2d 247.

## JURISDICTION

The jurisdiction of this Court is invoked under section 1254 (1) of the Judicial Code, as amended June 25, 1948 (effective Sept. 1, 1948, 62 Stat. 928; 28 U. S. C. Section 1254(1)).

The decision of the Court of Appeals was rendered December 20, 1948 (R. 484).

Petition for rehearing was denied January 17, 1949 (R. 545).

[redacted]

**In Decision of the District Court and the Distinction Between the Appeal to the Court of Appeal**

The Court of Appeal did not mention the matter of indispensable parties in its opinion since they had already been an appeal on the subject (116 F. 2d 85). Petitioner and the other defendants preserved the point fully in their statement of points (R. 46, 46, 45) and in their brief.

In the Court the question was moved by the previous issue of certiorari. *Universal Co. v. Board of Trade*, 314 U. S. 5. See also *Hall v. Harrison*, *Baltimore Basic Steel*, ___ U. S. ___, 70 S. Ct. 252, 9 L. Ed. 24 (January 9, 1950).

Certain important distinctions are to be noted between the case as presented originally by respondent and as finally alleged in the second amended complaint and as finally decided by the District Court.

In the first appeal the Court of Appeal treated the case as fundamentally one in which plaintiff was seeking to set aside the will and establish its sworn interest in the estate property. The Court distinguished the case at bar where the plaintiff sought construction of the will which would give him an interest in the case of his sworn trustee's acquiring the property. (116 F. 2d 85, at 88.)

The Court of Appeal reversed on the first appeal on the supposition that a decree could be entered which would not affect the interest of absent parties. In the second appeal the Court affirmed without mentioning petitioners' point that indispensable parties were absent apparently on the theory that in the first appeal had settled the matter as to law of the case. But in affirming was not apprised that there was an error of any kind under the issues presented since the decree actually entered did not affect directly the interest of absent parties.

**In Decree of U. S. Court of Appeals Is Decree With Decision of This Court and Other Court of Appeals Is Not Final Decree in Absence of Indispensable Parties.**

Indispensable parties were named in this case by the Court in the leading case of *Shields v. Barrow*, 17 How. 130, at page 139, to be—

> "Persons who not only have an interest in the controversy, but an interest of such nature that final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

This definition has been repeated in substantially the same language in numerous later decisions of this Court:

*Barney v. Baltimore City*, 6 Wall. (73 U. S.) 280;

*Elliott v. Peirsol*, 1 Pet. (26 U. S.) 328;

*Minnesota Co. v. St. Paul Co.*, 2 Wall. (69 U. S.) 609;

*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 244.

Under the above general definition it is well settled that suits will lie to rescind a contract or to determine rights under it if all parties to the contract are indispensable. *Shields v. Barrow*, 17 How. 130, 141; *Gregory v. Stetson*, 133 U. S. 579; *Commonwealth Trust Co. v. Smith*, 326 U. S. 291, 295; *Williams Natural Gas Co. v. Oneok, Inc.*, 96 F. 2d 111 (C. C. A. 8, 1938); *Brown v. Powell*, 77 F. 2d 64 (C. C. A. 5, Jan. 11, 1935, petition for certiorari filed in this Court March 7, 1935, No. 693).

Further, an assignee of an overriding interest entitled under such contract to assign or the owner of such interest is indispensable. *Roper Commerce Min. Co. v.*

**The Right of Absent Parties as to Necessity of Error in Decree Reserving Jurisdiction to Fix the Amount of Their Proportional Contribution to Plaintiff's Counsel Fee.**

We have referred above to the prayer of the second amended complaint and to provision of the decree retaining jurisdiction "to fix the amount of proportional contribution to plaintiff's counsel fee and that remainder from said heirs, legatees and devisees of the said [illegible] children lying within said letter termination of the trust as may accept the benefit of service rendered by plaintiff's counsel in creating and preserving said interests, either by uniting to or by receiving that share in the estate hereby established." (R. 42.)

It would seem obvious that said provision of the decree could in effect impose contingent contribution upon the share of those remainder-men who are not "cut in" to share with the vested remainder construction cannot properly be imposed upon persons who are not before the court. *Hone v. Trans* (D. C. 2 F. 2d 17 (C. C. A. 2, 1927), cert. den. 277 U. S. 587.

**The Decision of the Court of Appeal Is in Conflict With Decisions of This Court and Other Courts of Appeal by Affirming, in Effect, Its Decision on the First Appeal That Indispensability of Absent Parties Is Determined by Federal Rather Than State Law, With Corresponding Disregard of Illinois Decisions Regarding Indispensability.**

It is first quite the Court of Appeals to the Seventh Circuit said that the rule as to indispensability of parties must be determined by federal rather than local rule, 15 F. 2d at page 860, and this was, in effect, reaffirmed by its present decision on the merits.

[redacted]

We suppose the point [illegible] to be considered by this Court only if it is not persuaded that an outright dismissal of the case is more appropriate [illegible] because it highlights the difficulties that federal courts encounter in determining important questions of State law within the sometimes narrowing limitation of the federal diversity jurisdiction.

This is a case which is in the construction of its will could best be decided by the courts of Illinois. In fact if it were not for the view of this Court recently expressed against [illegible] concerning diversity jurisdiction (*Propper v. Clark*, 337 U. S. 472, 488; and *Meredith v. Winter Haven*, 320 U. S. 228, 237) by postponing until after all State decisions had finally settled State law, a federal action in order to avoid a decision of a federal constitutional issue (*Spector Motor Co. v. McLaughlin*, 323 U. S. 101; *Alabama v. Pugh*, 316 U. S. 52; *Railroad Commission v. Pullman Co.*, 312 U. S. 496) or where the only issue is a federal question one way or the other (*Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478), we should reject the dissenting view of Mr. Justice Frankfurter in *Commissioner v. Estate of Church*, 335 U. S. 632, 644, in favor of prior State Court adjudication at the expense of federal postponement, and urge in addition to those views our final applicability even to cases under the diversity jurisdiction.

But though the federal courts may not postpone decision in diversity cases pending further State Court adjudication, if the applicable law adjudication are several [illegible] same substantially similar facts, [illegible]

[illegible]

[illegible]

[illegible]

> "[illegible]

[illegible]

[illegible]

[illegible]
Provision in Will

[illegible]

[illegible]
Provision in Will

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Young (a Barrin)

[illegible]

Quarto

"Upon the marriage of my wife or upon the death [illegible] I give devise and bequeath to my said wife [illegible] to her and her assigns forever [illegible] to be equally divided among them my said children the issue of any child who may have then deceased taking by stirpes the share which such deceased child would be entitled to if living."

In the Quarto will the word "any child who may have then deceased" is obviously not tied down to any particular point of time. It is the equivalent of "who may have previously deceased" or "is deceased" or "deceased child." But in the phrase "if living" which does not contain the important phrase "at the death" *Byrn* will) or the adverb "then" (*Otto Young* will) does not tie the matter down as in the *Byrn* case and in *Le Barron* case to the termination of the trust.

The language in the other cases referred to by the court [illegible] does not seem to possess resemblance to the language in *Brown v. Byrn* or in the *Young* will. In those cases the gift to issue contain no words of survivorship as to the parent but instead in each instance described the share given to the issue simply as a "per stirpes share."

There is no recognition in any Illinois decision since

including the state of the law at that time, may be considered. "The state of the law at the time of the execution of a will often affords material assistance in arriving at the intention of the testator when that would otherwise be doubtful."

*Ireland v. Meador*, 269 Ill. 525, 529

"The law in this State is that a testator is presumed to have known the law and to have made his will in conformity therewith. (*Hinde v. Brownell*, 265 Ill. 465; *Walker v. Walker*, 262 Ill. 11; *Rankin v. Rankin*, 257 Ill. 286.) The state of the law at the time he will was made, therefore, affords considerable assistance in ascertaining the intention of the testator when such intention is otherwise not clear."

Petitioner earnestly believes that on the merits of the case the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decision. They respectfully urge that this Court should grant certiorari to review a case in which the Court of Appeals has inverted the doctrine of *New Hall-road v. Thompson* by completely disregarding, instead of applying, its proper rule of law.

WHEREFORE, your petitioner respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case therein and entitled on its docket Nos. 9988, 9989 and 9990, Margaret H. Horwin, individually, and as Executrix of the Will of Joseph Aaron H. Horwin, Deceased, Plaintiff-Appellee, vs. respectively, The First National Bank of Chicago, etc., Executors, Young Hogsworth Horwin and Aaron Julius Young Kaufman Pratt, et al., Defendants-

appellant, and that the judgment of the Court of Appeals may be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

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[

II

**[illegible] Question [illegible] Petitioner**

Respondent apparently claims that there has been a change in the theory of the case as originally presented and as it now stands except that in the supplemental pleading the nature of the interest of the deceased [illegible] (Respondent's Brief, p. 7).

In the first complaint the plaintiff claimed to be entitled through her son to intestate property because of the will alleged violation of the rule against perpetuities, or as residuary because of the trust or lack of the [illegible] in the complaint, or "one of the surviving issue, in the event or upon the [illegible] deceased grandchild of [illegible] Young." In the second amended complaint, plaintiff claimed for the first time that the devise of [illegible] Young to his grandchildren contingent vested remainders and that plaintiff as the [illegible] was entitled to an interest in the [illegible] against perpetuities point and the case of the [illegible]

In the first appeal the Court of Appeal assimilated the litigation to the *Hagan v. Hood*, 7 Wall. (74 U. S.) 62, [illegible] where the interest of distributees have been held severable and in the partition proceeding, rather than in the partition case like *Hagan v. Baltimore City*, 1 Wall. (7 U. S.) 290, where the interests are held an equity of severance and in the partition proceeding. In the first appeal the Court of Appeal treated the prayer in partition as surplusage (216 U. S. 26 at 30).

Any fair comparison of the original complaint with the final complaint as limited at the trial will demonstrate, perforce, the difference between the two approaches.

II.

III.

## III.

### That the so-called absent parties are not indispensable.

[illegible] the controversy as to the character and [illegible] of the remaining interests would therefore very clearly to fall within the description of indispensable parties laid down by Mr. Justice Miller in *Barney v. Baltimore City*, 6 Wall. 280, 284, as follows:

> "that there is a third class whose interest in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such case the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

That should be the result in this case.

## III.

**The "Federal Question" Is Not Involved Here So As to Confer Jurisdiction Independently of the Diversity of Citizenship.**

Respondent entirely misconceives this basis for jurisdiction, since it is not enough that respondent merely invoke jurisdiction on this ground. The jurisdiction must be supported by a substantial question of Federal statutory interpretation; and if the interpretation has already been authoritatively settled, jurisdiction because of a Federal question must fail.

The point raised by respondent under Point IV of his brief in opposition (pp. 25-27) is not even the same as that relied on in his petition for certiorari in Case No. 79 where respondent makes an attack upon the validity of the consolidation ruling, thus merely the point that as to the Title Guaranty trust there was no valid succession to the proceeding. In no [illegible] respondent's Point IV, the Federal question is supposed to arise as follows:

The Trustee originally named in the Will was First Trust and Savings Bank of Chicago, a corporation organized under the laws of the State of Illinois, on February 21, 1929, that corporation was consolidated with Union Trust Company, an Illinois corporation, and the consolidated company changed its name to First Union Trust and Savings Bank, an Illinois corporation. On July 17, 1931, First Union Trust and Savings Bank was consolidated into and merged with The First National Bank of Chicago, a national banking institution, pursuant to approval of the Auditor of Public Accounts of the State of Illinois, and a certificate of consolidation issued by the Comptroller of Currency of the United States.

Certainly no Federal question arises on the first consolidation of the two Illinois corporations. In fact, that consolidation was proper under the law of Illinois. *Chicago Title and Trust Company v. Kinzer*, 326 Ill. 21.

The respondent charges, in effect, that the last consolidation having been accomplished and authorized by the National Banking Act, known as the McFadden Act of 1927, a Federal question arose as to whether the consolidated bank had the power or authority to succeed to the trusteeship in the Otto Young Estate formerly exercised by its predecessors, First Trust and Savings Bank and First Union Trust and Savings Bank.

No Federal question arises out of those facts.

The McFadden Act of 1927 (12 U. S. C. A. Sec. 36 (a)) makes provision for consolidation of a State Bank with a National Bank. The consolidation in this case with The First National Bank of Chicago under the McFadden Act does not give the Federal Court jurisdiction. An Act of

Congress as provided. (Title 12 U. S. C. A. Sec. 1001); Southern Trust Co. v. Texas & Pacific R. R. Co., 234 U. S. 392, 398; Federal Land Bank (In re) Omaha and Four Interstate Casualty Co. v. United States National Bank of Omaha, 6th Circuit, 121 F. 2d 8 (C. C. A. 8, 1939); Deposit v. Brigham, 155 F. 2d 22 (C. C. A. 9, 1946, certiorari denied, 329 U. S. 779, 816.)

The Petitioner, but in the Farm Worcester County National Bank, 277 U. S. 24, was unable to constitutional on the ground that the challenged provision authorizing a bank incorporated or consolidated under the Act to succeed to the trusteeship of its predecessor was not directory but merely permissive; and that being permissive, the right of succession could depend upon the State law.

That question having been decided by this court no longer remains in ground for Federal jurisdiction. California Water Service Co. v. Redding, 304 U. S. 252, 255; Lawrence and Corrigan (In re) Morris, 299 U. S. 102, 105-6.

The only remaining question in this case is a State law question, namely, whether the Illinois State law would permit the institution consolidated or incorporated under the Act to succeed to the trusteeship of its predecessor.

V.

**That the Public Interest Was Decided in Accordance With the Local Law.**

Under this point respondent proves upon its (our) quotation from the opinion of the two courts below and its misconception that the quality of the respective interests involved in this case turns upon such a close question of state law that this Court, in line with its opinion in Spiegel v. Commissioner, 335 U. S. 701, will have no

[illegible] holding of the Court of Appeals. This misconception seems in large measure from the confusion resulting from the assumption that the *Rules* v. *Hillett*, [illegible] has a bearing on this case, and that *People* v. *Byrd*, [illegible] is distinguished.

Frankly, we can do no more in this reply brief than to refer to our original petition (pp. [illegible]) and point out that we do not rely on *Rules* v. *Hillett* but on the square decision of *People* v. *Byrd*, which involved precisely equivalent language and has never been questioned in any Illinois decision.

The opinion below is not, and cannot, explain away the clear and unimpeached holding of the highest court in Illinois construing language which is the precise equivalent of that at issue in this case. The decision below has decided an important issue of local law in a way in conflict with applicable local decisions. It should be reversed.

## II.

## Neither Rule Nor Decision

Respondent's final misconception seems to be that the Rules of Civil Procedure have changed the well established principle that the entry of a decree over indispensable parties can never constitute reversible error. We find nothing in the Rules cited by respondent or in the decisions since the promulgation of the Rules which support any such contention.

Rule 21 provides that misjoinder (and not a respondent summae non-joinder) is not ground for dismissal of an action.

Rule 12 (h) expressly except from any waiver by it[illegible] failure to include in motion or answer, "the defense of failure to join an indispensable party."

It was well settled both before and after the promulgation of the Rules that non-joinder of indispensable parties is a matter of such substance that an appellate court may properly consider the defect even though the point was not raised in the trial court. *See v. Wilson*, 9 Wall. (76 U. S.) 331, 340; *Hyer v. Brooks*, 115 F. 2d 776, 777 (C. A. D. C., 1939); *McConnell v. Dennis*, 112 Fed. 647, 650 (C. C. A. 9, 1901); *Brown v. Christmas*, 128 F. 2d 822, 832 (C. A. 9, C., 1942).

In this case the petitioner-defendants preserved the point of lack of indispensable parties in their answer and in their assignment of error. (R. 19-20; 39; 48.)

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For the reasons aforesaid, petitioner asks that prayer for review of the above cause by issuance of the writ of certiorari.

Respectfully submitted,

DAVID A. WARD,

*Attorney for Marie Julia Young Kaufman Pratt, Otto Young Kaufman, Catherine Ottilie Young Brescatto Anderson, Ann Elizabeth Young Tyler, Young Young Wicker Bass, Walter P. Wicker, Jr., Catherine Young Alexander, and John William Young Martin, Petitioners.*

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[illegible]

[illegible]

# Supreme Court of the United States

[illegible]

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No. 77[illegible]

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[illegible]

Petitioners,

[illegible]

Petitioner,

v.

[illegible]

Respondent.

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[illegible]

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May it Please This Court:

The separate petitions for certiorari have been filed on behalf of certain appellants in this case [illegible] (No. 771, 772, 773) the Honolulu Rock petition filed May 1, 1950 (No. 780). But due to the absolute resemblance of these petitions, involving as they do the same controversy and presenting identical arguments, respondent submits this brief in answer to both petitions.

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[illegible]

In their anxiousness to frame a petition which might induce the granting of certiorari, petitioners have gone outside the record and have misstated matters within the record. Despite this distortion, we shall demonstrate that the two contentions made in the petition are totally devoid of merit.

As a complete answer to both points in both petitions, we will show: (1) that the jurisdiction was settled on a prior appeal; (2) that the so-called absent parties are actually before the court by representation; (3) that the so-called absent parties are not indispensable, and that there are no conflicting decisions; (4) that in no event could the complaint be dismissed since the jurisdiction was invoked on the additional ground that a federal question is necessarily involved; (5) that the defense of nonjoinder of parties is not ground to dismiss (as constitute merely a plea in abatement not involving jurisdiction and as such is not subject to review; (6) that having made no motion in the trial court to bring in the so-called absent parties, petitioners cannot now be heard to complain that the Court erred in failing to order such parties brought in; and (7) that the minor interest question was decided by the District Court and by the Court of Appeals not contrary to the local law but in complete accord with it.

II.

The Jurisdictional Question Is Settled By a Prior Appeal

Straining to make a case for certiorari, the petitioner here contrived a different presentation of their jurisdictional attack in an effort to avoid the settlement of this question on the prior appeal.

Both petitions assert as the point of paramount importance that indispensable parties were omitted. But precisely this same contention was decided adversely to petitioner on the first appeal (see P. 28 [illegible] pet. for cert. 27 [illegible]) making it imperative to any hope of reexamination that their jurisdictional objection be reimposed. To this end they now urge in their second set of petitions to this Court for certiorari "distinction between the first appeal and the second" relative to jurisdiction.

The first petition contains the attempt to circumvent the prior ruling (pp. 4, 5): "The District Court dismissed the cause for lack of jurisdiction. The Circuit Court of Appeals reversed this decision and remanded for trial on its merits, holding, under the issues then presented, that the defendants in question were not indispensable, for the reason that a decree could be entered on the issues raised by the plaintiff without affecting the rights of the absent parties. (see P. 28 [illegible].) Petition for writ of certiorari to this Court from the first decision of the Court of Appeals in the instant case was denied (see U. S. [illegible]). The case was finally tried on the entirely different theory that plaintiff had inherited from its predecessor and remainder interest under the will."

A similar effort to bypass the holding of the first appeal is made in the first petition where this statement appears (pp. 6-7):

Although petitioners press *Young* v. *Powell* (5 C.A.), 165 F. 2d. 147, cert. den. May 1, 1950, it is patently inapplicable to the case at bar as the court, itself, made clear.*

In the *Powell* case one residuary distributee of an estate sued to cancel and rescind transactions allegedly consummated by the defendant through the perpetration of fraud and the exertion of undue influence upon the testator. The executor of the estate and other residuary distributees were omitted as parties. The court expressly approved of those cases applicable here, such as *Payne* v. *Hook*, 74 U.S. 425; *Waterman* v. *Canal-Louisiana Bk. Co.*, 215 U.S. 33, and *Seeley* v. *Cornell*, 74 F. 2d. 353, but held they were inapplicable because the plaintiff in the *Powell* case was endeavoring to enforce "an indivisible right" of rescission, whereas in the *Payne, Waterman* and *Seeley* cases because of "the separate and divisible nature of the plaintiff's de-

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* The action of this Court on May 1, 1950, denying certiorari in *Powell* v. *Young* (No. 688) to review the decision in 179 F. 2d. 147 (5 C.A.) would appear to control here. The petition in the *Powell* case is identical with the petitions in the instant case. The *Powell* petition, like those at bar, asserted a failure by the Court of Appeals to follow this Court in its declarations of law as to indispensable parties. Each of the petitions, there and here, makes the further claim that there is a conflict in the decisions from the several Circuits upon the indispensable party question.

Comparison of the petitions at bar and the *Powell petition* will at once reveal the common basis for these unfounded contentions. It flows from a failure to distinguish between cases wherein the right asserted was separate and divisible and those where it was indivisible and unitary, a distinction drawn specifically in the opinion of *Young* v. *Powell*, 179 F. 2d. 147, and in the several cases cited to which reference will be made.

Attempting to show conflict with this Court, the petitioner in *Powell* v. *Young* cited: *Payne* v. *Hook*, 74 U.S. 425; *Horn* v. *Lockhart*, 84 U.S. 570; *Waterman* v. *Canal-Louisiana Bank*, 215 U.S. 33; *Princess Lida* v. *Thompson*, 305 U.S. 456; *Sutton* v. *English*, 246 U.S. 199; and *Borer* v. *Chapman*, 119 U.S. 587. Attempting to show conflict among the Circuits, the petitioner in the *Powell* case cited: *Roos* v. *Texas Co.*, 23 F. 2d. 33; *Seeley* v. *Cornell*, 74 F. 2d. 353; *Atwood* v. *National Bank of Lima*, 115 F. 2d. 861; *Williams* v. *Crabb*, 117 Fed. 193; *Texas Company* v. *Wall*, 107 F. 2d. 45; *DeKorwin* v. *First National Bank of Chicago*, 156 F. 2d. 858.

It should be observed that the ruling upon the prior appeal in the instant case, *Korwin* v. *First Nat. Bank*, 156 F. 2d. 858, cert. den. 329 U.S. 795, was unsuccessfully invoked by the *Powell petition* to show the same conflict as is asserted in the petitions for certiorari here.

mand'' the other interested persons were not indispensable. The court held the *Powell* case to be controlled by *Shields* v. *Barrow,* 58 U.S. 130, and by that portion of the decision in *Hudson* v. *Newell* (5 C.A.), 172 F. 2d. 848, pertaining to the cancellation of instruments, and ruled that the absent parties were, therefore, indispensable.

*Shields* v. *Barrow,* 58 U.S. 130, the controlling authority in *Young* v. *Powell,* 179 F. 2d. 147, has been distinguished from the decisions applicable here in the following cases, among others: *Horn* v. *Lockhart,* 84 U.S. 570, 579; *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U.S. 33, 48; *Roos* v. *Texas Co.* (2 C.A., by L. Hand, J.), 23 F. 2d. 171, 172, cert. den. 277 U.S. 587; *Currier* v. *Currier* (S.D.N.Y.), 1 F.R.D. 683, 684; *Chidester* v. *City of Newark* (3 C.A.), 162 F. 2d. 598, 600; *Oxley* v. *Sweetland* (4 C.A.), 94 F. 2d. 33, 33, 37; *Edenborn* v. *Wigton* (5 C.A. ), 74 F. 2d. 374, 376, cert. den. 294 U.S. 719; *Hudson* v. *Newell* (5 C.A.), 172 F. 2d. 848, 852; *Young* v. *Powell* (5 C.A.), 179 F. 2d. 147, 151; *Kentucky Nat. Gas Corp.* v. *Duggins* (6 C.A.), 165 F. 2d. 1011, 1015.

The petitioners have also introduced *Barney* v. *Baltimore City,* 73 U.S. 280, to show confusion in the law relating to indispensable parties. The *Barney* case held that in a suit to partition land all interested persons are indispensable. The correctness of this proposition has never been doubted since it is obvious that partition can not be had without necessarily and adversely affecting the rights of cotenants. The principle of *Barney* v. *Baltimore City,* therefore, manifestly can have no application to the instant case.

The conclusion is irresistible that no conflict exists now, and that there never has been conflict in the decisions applicable to the case at bar. These cases uniformly hold that an heir, next of kin, legatee, devisee, or cestui has a

severable and divisible interest in property and may assert his individual right to a share of the fund, estate or property and obtain an accounting without making parties to the suit all others interested. And this has been held true whether those interested but absent parties are identified with the plaintiff in interest or are adverse to him.

Whether a person has a several or joint interest in a fund, estate or property is answered by reference to State law, but there can be no reference to State law for the determination of whether in Federal court proceedings a person is a dispensable or indispensable party to litigation. The latter question is for the Federal courts to determine exclusively, and for obvious reasons. The decisions are uniformly to this effect. See *DeKorwin* v. *First Nat. Bank,* 156 F. 2d. 858, 860, cert. den. 329 U.S. 795; *Equitable Trust Co.* v. *Denny* (7 C.A.), 24 F. 2d. 169 at 170; *Chicago M. St. P. R. Co.* v. *Adams County* (9 C.A.), 72 F. 2d. 816 at 818; *Rogers* v. *Penobscot Mining Co.* (8 C.A.), 154 Fed. 606.

"The peculiar and limited jurisdiction of the Federal courts, affected as it is by the citizenship of the parties, has resulted in a well-recognized modification" (*Equitable Trust Co.* v. *Denny,* 24 F. 2d 169, 170, per Lindley, J.) of chancery rules, otherwise applicable, for the determination of indispensable parties. Accordingly, it is the rule in the Federal courts that all the *cestuis* of a trust are not indispensable parties to a suit for the removal or appointment of a trustee. *Sanders* v. *Hall* (10 C.A.), 74 F. 2d. 399, 404, cert. den. 295 U. S. 739; *Wesson* v. *Crain* (8 C.A.). 165 F. 2d 6. *In re National Realty Trust,* 167 F. 2d. 440, cited by petitioners, is not to the contrary for it holds no more than that beneficiaries of a common law trust, in reorganization under the Chandler Act, must be given notice because the Statute requires it.

The Koch petition (pp. 24-25) conjures up certain developments which it is suggested could possibly cause the decree to leave the controversy in a condition "wholly inconsistent with equity and good conscience," as does the *Pratt* petition (p. 19) in referring to the shares in this estate as pieces of a pie. The far fetched situations, invented in an obvious attempt to fit several decisions holding omitted parties to be indispensable, could arise only if the time for division and distribution arrived while the accounting is still being conducted by the District Court. However involved the problems might be in such event, this Court gave the solution in *Payne* v. *Hook,* 74 U.S. 425. After pointing out in the *Payne* case (p. 432) that "it can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked," this Court said (p. 432):

> "A court of equity adopts its decrees to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefits of the litigation."

## IV.

### A Federal Question Is Also Involved Giving The Court Jurisdiction Independently Of The Diversity In Citizenship.

Jurisdiction of the Federal Court was also invoked in this cause upon a second, independent, ground, it appearing from the complaint (R. 133): "That the jurisdiction of this Court is invoked, as will hereinafter more fully appear, . . . upon the further ground that a Federal question is

necessarily involved." In this connection the plaintiff had averred (R. 147):

> "That by reason of the premises a right has accrued to plaintiff . . . to have construction of the act of Congress involved herein and a ruling upon its application hereto . . .

We need not labor the point, though, that a substantial Federal question is necessarily involved in the cause. The petitioners, without seeming to be aware of its import, have expressly conceded that the suit is one arising under the constitution and laws of the United States.

In the Koch petition, the following admission appears (pp. 3-4):

> "The original and the several amended complaints also challenged, as a matter of construction of the will and the application of State and Federal statutes, the trusteeship of the First National Bank of Chicago (156 F. 2d 858, 859, 860; R. 441; record in this Court in *First National Bank* v. *DeKorwin*, October term, 1946, No. 696, pages 3-21)."

The Pratt petitioners make this concession (pp. 3-4):

> "The complaint also challenged as a matter of construction of the will and the application of State and Federal statutes, the trusteeship of the First National Bank of Chicago. (156 F. 2d 858, 859, 860; R. 441; record in this Court in *First National Bank* v. *DeKorwin*, October Term, 1946, No. 696, pages 3-21.)"

There can be no doubt of the respondent's request for declaratory relief being effective to raise a Federal question under the McFadden Act in its relation to the right of the First National Bank to administer the trust. *E. Edelman & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852, cert. den. 300 U. S. 680; *Crosley Corp.* v. *Hazeltine Corp.*, 133 F. 2d 925, cert. den. 316 U. S. 813; *Dewey & Almy Claim Co.* v. *Am. Anode*, 137 F. 2d 68, cert. den. 320 U. S. 761.

And it is settled that once jurisdiction of the Federal court has been properly invoked it "has jurisdiction to determine and settle all issues." *Greene* v. *Louisville R. R. Co.*, 244 U. S. 499, 508; *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 264; *Davis* v. *Wallace*, 257 U. S. 478, 482; *Chicago G. W. Ry.* v. *Kendall*, 266 U. S. 94, 97-98; *Linquist* v. *Dilkes*, 127 F. 2d 21, 25. See, also, *Hurn* v. *Oursler*, 289 U. S. 238; *R. R. Comm.* v. *Pacific Gas Co.*, 302 U. S. 388, 391, and *Armstrong Co.* v. *Nu-Enamel Co.*, 305 U. S. 315, 325.

It has been repeatedly held that if there be one Federal question in the case it is of no importance that the others are non-Federal since the court having been validly invested with jurisdiction retains it to determine all questions, both local and Federal, which are a part of the controversy. (*Davis* v. *Wallace*, 257 U. S. 478, 482; *R. R. Comm.* v. *Pacific Gas Co.*, 302 U. S. 388, 391.)

It inevitably follows that apart from the diversity jurisdiction all of the issues in this case were properly before the court for consideration and disposition. And since the existence of a Federal question alone brought this about, it follows also that the citizenship of the interested parties is unimportant. Assuming without conceding that petitioners' contention with respect to absent indispensable parties were sound, and upon such parties being brought in total diversity of citizenship disappeared, such a development could not destroy the Federal Court's jurisdiction. In these circumstances the action could not be dismissed because the omitted parties might be brought before the court by supplemental powers. The proceeding is one *in rem* and all persons interested in the estate are within the reach of constructive service. Under such circumstances, if the petitioners would not bring in the absent parties, the respondent would certainly be accorded that opportunity. In any event, it is clear that the cause could not be dismissed for want of jurisdiction in the court.

## V.

### The Future Interest Question Was Decided In Complete Accord With The Local Law.

As the second and last point in each petition it is claimed that the Court of Appeals and the District Court ruled contrary to Illinois law in finding that the remainders were vested estates (Koch petition, pp. 26-35; Pratt petition, pp. 24-33). In essence these arguments are identical, the gist of their complaint being that the courts below followed the Illinois Supreme Court rulings in *Warrington* v. *Chester* (1920), 294 Ill. 524, and *Smith* v. *Shepard* (1939), 370 Ill. 491, to the effect that the remainders were vested, instead of the earlier determination in *People* v. *Byrd* (1911), 253 Ill. 223, that the limited estates were contingent remainders.

In actuality there can be no serious dispute of the vested character of Otto Young's remainder gifts. We need only turn to the outstanding authority on future interests for the rule of definition which exactly fits Otto Young's dispositive language (Gray on Perpetuities, 4 ed., sec. 108):

> "Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of or into the gift to the remainderman then the remander is contingent; but, if, after the words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus a devise to *A* for life, remainder to his children, but if any child dies in the lifetime of *A* his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to *A* for life, remainder to such of his children as survive him, the remainder is contingent."

The opinion of the District Court was written by Judge Igoe and the opinion of the Court of Appeals by Judge

Lindley, each of these learned jurists being a lawyer of long and wide experience at the Illinois bar. What was said in the recent case of *Spiegel* v. *Commissioner*, 335 U. S. 701, therefore, has peculiar application here. In the *Spiegel* case this Court, speaking through Mr. Justice Black, said (pp. 707-708):

> "It is contended that under Illinois law the corpus of this trust would not have reverted to the settlor had he outlived the beneficiaries. The record reveals that the state law problem here is not an easy one, but under this Court's decision in *Meredith* v. *Winter Haven*, 320 U. S. 228, the difficulty involved did not relieve the Court of Appeals of its duty to make a decision. The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficaries die the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law. (*Helvering* v. *Stuart*, 317 U. S. 154, 162-165; cf. *Steele* v. *General Mills*, 329 U. S. 433.)"

A short and ready answer to petitioners' extensive arguments that the adjudications below upon the quality of remainders were erroneous is to be found in the scholarly opinions on this subject by the District Court and the Court of Appeals. In respect of the remainder issue, Judge Igoe said (R. 409, 412-413, 415; 84 F. Supp. 918, 927, 929, 930):

> **"The foundation for this entire controversy is thus squarely presented: Are the gifts in remainder to Otto**

Young's grandchildren vested or contingent interests? Established rules for the construction of wills must guide the court in deciding this basic issue. Differentiating between vested and contingent remainders under the law of future interests seems invariably to have been fraught with difficulty, and as attested by the extensive arguments made here this case is no exception. The course of this litigation has been marked by the cooperative conduct of all counsel in the avoidance of unessential pleadings and needless proof, and able and exhaustive briefs have been submitted thoroughly presenting the several problems involved. . . .

"The cases both here and elsewhere dealing with this problem have, in overwhelming number, affirmed the position taken by the plaintiff. Plaintiff's counsel concedes that from time to time beginning with Bates v. Gillett, 132 Ill. 287, 24 N. E. 611, contrary decisions have been announced by the Supreme Court of Illinois, among them People v. Byrd, 253 Ill. 223, 97 N. E. 293; Cummings v. Hamilton, 220 Ill. 480, 77 N. E. 264, and Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214, upon which and the principle of which some of the defendants rely. The plaintiff asserts that the latter decisions follow Bates v. Gillett, 132 Ill. 287, 24 N. E. 611, in principle, and that the Bates case, overruled in Dustin v. Brown, 297 Ill. 499, 130 N. E. 859, can no longer be deemed applicable. See Crowley v. Engelke, 394 Ill. 264, 272, 68 N. E. 2d 241. This court is of the opinion that at all relevant times the authorities opposed to Bates v. Gillett were numerically in preponderance, and that Dustin v. Brown destroyed the efficacy of the principle upon which the defendants must rely to defeat the plaintiff's claim.

"The special emphasis which People v. Byrd, 253 Ill. 223, 97 N. E. 293, has been accorded by counsel for some of the defendants has necessitated special consideration of it. That was a tax case, and both sides agreed that the will involved there should be controlled by the law of New York. Only New York cases were cited by the Illinois Supreme Court in its opinion. It is disapproved by text writers, whose opinions upon Illinois law have been accorded recognition, as not in harmony with the authorities. It applies a principle approved in Bates v.

Gillett, and rejected in Dustin v. Brown. It cannot be reconciled with the later case of Warrington v. Chester, 294 Ill. 524, 128 N. E. 549. For some one or more of these reasons People v. Byrd, even if it were otherwise applicable here, can not be accepted as an authority....

"The cumulative impact of the great weight of authority which plaintiff's counsel has brought to bear upon this issue of construction, aided by reference to the general rules of construction, and further supported by the special context of Otto Young's will, has persuaded this court to adopt the view that the remainder gifts of corpus to grandchildren were always vested. This remainder was vested in such of the testator's grandchildren as were in esse at his death and opened up to let in others as they were afterward born. If the remainder was thus vested it seems conceded that it would be divested in favor of issue alone. The defendants do not controvert the latter proposition and, indeed, it does not seem that such could successfully be disputed in the face of the array of authorities cited in support, which include, among others, the following: Siddons v. Cockrell, 131 Ill. 653, 23 N. E. 586; Knight v. Pottgieser, 176 Ill. 368, 52 N. E. 934; Pingrey v. Rulon, 246 Ill. 109, 92 N. E. 592; Northern Trust Co. v. Wheaton, 249 Ill. 606, 94 N. E. 980; 34 L. R. A., N. S., 1150; Warrington v. Chester, 294 Ill. 524, 128 N. E. 549; Dustin v. Brown, 297 Ill. 499, 130 N. E. 859; Smith v. Shephard, 370 Ill. 491, 19 N. E. 2d 368; Continental Ill. Nat. Bank v. Kane, 308 Ill. App. 110, 31 N. E. 2d 351."

Sustaining the District Court's adjudication of vested remainders, Judge Lindley, speaking for the Court of Appeals, said (R. 486-487, 488; 179 F. 2d 347, 349-350):

"Although appellants argue that the language 'the surviving issue of any deceased grand-child to stand in the place of and receive the share which such deceased grand-child would have been entitled to receive if then living' definitely evinces an intent upon the part of the testator that the gifts to his grandchildren should be contingent upon their surviving the termination of the trust, an examination and analysis of Illinois cases dealing with the effect of language substan-

tially like that quoted impels the conclusion that the contention must be rejected. It is true that, prior to 1915, a number of Illinois cases held that the existence of a clause providing that the children or descendants of a deceased remainderman should take the parent's share made the remainder contingent. Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214; Cummings v. Hamilton, 220 Ill. 480, 77 N. E. 264; Brownback v. Keister, 220 Ill. 544, 77 N. E. 75; People v. Byrd, 252 Ill. 223, 97 N. E. 293. Of these, Bates v. Gillett has since been overruled, in part at least; Dustin v. Brown, 297 Ill. 499, 508, 130 N. E. 859; Crowley v. Engelke, 394 Ill. 264, 272, 68 N. E. 2d 241, and the extent to which People v. Byrd can be relied upon is somewhat clouded by the fact that the will there involved was construed on the basis of the law of New York rather than that of Illinois, even though the court held the law of the two states to be the same. And that the view expressed in those cases was not then the settled view of the Illinois court seems evident from the decisions in Siddons v. Cockrell, 131 Ill. 653, 23 N. E. 586; Knight v. Pottgieser, 176 Ill. 368, 52 N. E. 934, and Northern Trust Co. v. Wheaton, 249 Ill. 606, 94 N. E. 980, 34 L. R. A., N. S., 1150, all decided prior to 1915, in which remainders were held vested despite the presence of a clause providing that the children or descendants of a deceased remainderman should take the deceased parent's share.

"Since 1915, we think, the Illinois cases have uniformly held that such a provision as that under discussion does not prevent the remainder from vesting on the death of the testator but rather fixes the conditions upon which divestiture will occur and the executory gift over, i.e., the gift to the descendants of the deceased remainderman—take effect. Remmers v. Remmers, 280 Ill. 93, 117 N. E. 474; McBride v. Clemons, 294 Ill. 251, 128 N. E. 383; Warrington v. Chester, 294 Ill. 524, 128 N. E. 549; Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62; Boye v. Boye, 300 Ill. 508, 133 N. E. 382; People v. Allen, 313 Ill. 156, 144 N. E. 800; Smith v. Shepard, 370 Ill. 491, 19 N. E. 2d 368. See also Hodam v. Jordan, D. C., 82 F. Supp. 183.

"Of course the District Court, in construing the Young will, was bound to follow the law of Illinois as last announced by the Supreme Court of that state, Erie Railroad v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487; Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 327. Thus, in determining the effect to be given the clause, 'the surviving issue of any deceased grand-child to stand in the place of and receive the share which such deceased grand-child would have been entitled to receive if then living,' we think the court below properly relied on the rule announced in Warrington v. Chester, 294 Ill. 524, 128 N. E. 549, and Smith v. Shepard, 370 Ill. 491, 19 N. E. 2d 368, rather than that of People v. Byrd, 253 Ill. 223, 97 N. E. 293. The decisions in those cases, considered in conjunction with the settled Illinois rules preferring vested rather than contingent interests, Riddle v. Killian, 366 Ill. 294, 300, 8 N. E. 2d 629, and favoring the early vesting of estates, Murphy v. Westhoff, 386 Ill. 136, 140, 53 N. E. 2d 931, led the District Court to the conclusion that the remainders involved in the present case were vested rather than contingent. The same considerations seem to us to require this court to affirm the judgment in that respect. . . .

"And finally, it must be remembered that the best guide to the testator's intent is the particular dispositive language used by him. Here, that language, though perhaps not as plain as some might desire, is substantially equivalent to that which Illinois construes as creating a vested remainder, subject to divestiture only by death with issue in the period prior to distribution. Knight v. Pottgieser, 176 Ill. 368, 52 N. E. 934; Warrington v. Chester, 294 Ill. 524, 128 N. E. 549; Smith v. Shepard, 370 Ill. 491, 19 N. E. 2d 368. In the case of Stanley Young, the event upon which divestiture was conditioned never occurred, and his interest in the corpus passed, on his death intestate, to his heirs at law, through one of whom (his father) the present plaintiff claims."

In the light of these lower court opinions it is impossible to regard the petitioners' future interest argument as having been seriously submitted.

## VI.

### Conclusion.

Other reasons might be advanced why the petitioners' assertion that indispensable parties were omitted will not support issuance of the writ of certiorari. For instance, petitioners' complaint amounts to a defense of nonjoinder, and the Rules specifically provide that such omission "is not ground for dismissal of an action" (F. R. C. P., 21).

Again, the Rules provide for assertion of certain defenses by motion (Rule 12b), among them being "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, . . . (7) failure to join an indispensable party." The very listing of these grounds for attack on a complaint indicates that a failure to join indispensable parties constitutes neither a lack of jurisdiction over the subject matter nor a lack of jurisdiction over the person. A motion under Rule 12b (7) would, therefore, amount to a plea of abatement not involving jurisdiction. Section 2105 of the Judicial Code (Title 28, U. S. C., § 2105) provides: "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

It might be assumed purely for the argument, then, that the Chancellor was in error with respect to his ruling upon the failure to join an indispensable party, and yet such error could afford no basis for a reversal in this Court.

Furthermore, petitioners not having moved to have the so-called absent parties joined in the trial court (Rule 21) cannot be heard to complain here that such parties were not brought in.

No foundation for review by certiorari having been shown either in the petition of Gwendolyn Koch or in the petition on behalf of Marie Pratt, *et al.*, the applications for such further appeal should be denied.

Respectfully submitted,

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MAY 1 1950
CHARLES ELMORE CROPL
CLER

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

## Nos. 789

MARGARET DE KORWIN, Individually, and as Executrix of the Estate of Joseph Maria de Korwin, deceased, and JOHN EDWARD SULLIVAN, Special Trustee,

*Petitioners,*

vs.

THE FIRST NATIONAL BANK OF CHICAGO, a National banking association, individually, and as acting Trustee of the Estate of Otto Young, deceased; GWENDOLYN YOUNG HEYWORTH KOCH; MARIE JULIA YOUNG KAUFMAN PRATT; OTTO YOUNG KAUFMAN; CATHERINE OTTOLIE YOUNG BREWSTER COCHRAN; ANN ELIZABETH YOUNG SAGE; NANCY YOUNG SHAW; WALTER F. WICKES, JR.; CATHERINE YOUNG ALEXANDER; JOHN WILLIAM YOUNG MARTIN; HOWARD MOSES, Guardian Ad Litem; JANE CATHERINE PULITZER, Guardian; DOROTHY DILLEY KAUFMAN, Guardian; and, MICHAEL FAHY, Trustee;

*Respondents.*

**PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

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## Nos.

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MARGARET DE KORWIN, Individually, and as Executrix of the Estate of Joseph Maria de Korwin, deceased, and JOHN EDWARD SULLIVAN, Special Trustee,

*Petitioners,*

VS.

THE FIRST NATIONAL BANK OF CHICAGO, a National banking association, individually, and as acting Trustee of the Estate of Otto Young, deceased; GWENDOLYN YOUNG HEYWORTH KOCH; MARIE JULIA YOUNG KAUFMAN PRATT; OTTO YOUNG KAUFMAN; CATHERINE OTTOLIE YOUNG BREWSTER COCHRAN; ANN ELIZABETH YOUNG SAGE; NANCY YOUNG SHAW; WALTER F. WICKES, JR.; CATHERINE YOUNG ALEXANDER; JOHN WILLIAM YOUNG MARTIN; HOWARD MOSES, Guardian Ad Litem; JANE CATHERINE PULITZER, Guardian; DOROTHY DILLEY KAUFMAN, Guardian; and, MICHAEL FAHY, Trustee;

*Respondents.*

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**PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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*To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

## I.

## PETITION FOR CERTIORARI.

Your petitioners, Margaret de Korwin, individually, and as executrix of the estate of Joseph Maria de Korwin, deceased, substituted plaintiff below, and John Edward Sullivan, appointed special trustee *pendente lite* by the District Court, pray for a review on certiorari of that part of the decision in this cause by the Court of Appeals for the Seventh Circuit which partially reverses a decree of the District Court, and in support hereof respectfully show:

### (A)

### The Opinions Below.

The opinion of the District Court (R. 399-429) is reported in 84 F. Supp. 918. The opinion by the Court of Appeals (R. 484-496) is reported in 179 F. 2d 347.

The portion of each opinion pertinent to this petition is for convenience set out in the Appendix submitted herewith ("A", "B", pp. 1-6, pp. 7-14).

### (B)

### Basis of Jurisdiction.

Jurisdiction to review the decision below is invoked under U. S. C., Title 28, sec. 1254, par. 1 (62 Stat. 928).

The judgment to be reviewed was rendered by the Court of Appeals for the Seventh Circuit on December 30, 1949, and timely petitions for rehearing were denied February 1, 1950. The petition in conformity with Rule 38 of this Court is presented within the time limited by U. S. C., Title 28, sec. 2101 (c) (62 Stat. 962).

## (C)

### Matter Involved.

The matter involved is the meaning and validity of the so-called consolidation provisions of the McFadden Act (44 Stat. 1225, 48 Stat. 190, U. S. C., T. 12, sec. 34 (a)).*

In a suit by petitioner De Korwin against the respondent Bank and others for a declaratory judgment and for the appointment of a successor trustee and an accounting, the District Court held the Bank without authority to administer the trust and ordered it to account as a trustee *de son tort*. 84 F. Supp. 918. The Court of Appeals ruled that the Bank had been invested with the trusteeship by the terms and provisions of the McFadden Act and set aside the findings of vacancy in the trust and the *de son tort* liability of the Bank. In all other respects, the District Court decree was affirmed. 179 F. 2d. 347.**

Three identical judgments were entered by the Court of Appeals due to the prosecution of separate appeals (R. 497-499), and, therefore, the issuance of three writs of certiorari is asked to review that part of the decision which reverses the District Court decree.

This litigation involves the testamentary trust estate of Otto Young, a pioneer Chicago merchant, who died in 1906. The trust properties comprise a number of buildings in the heart of Chicago's business district and are estimated to be worth from thirty-five to eighty million dollars. It is reputedly the fifth largest private trust in this country (R. 399).

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* The so-called consolidation provisions of the McFadden Act, Sec. 34(a), as they appeared in 1933 during the time in question, are set out in their entirety in the accompanying Appendix (pp. 15-17).

** On a prior appeal the Federal jurisdiction was sustained. 156 F. 2d 853; cert. den. 329 U. S. 795.

Without authority under the will of Otto Young and lacking power under Illinois law, the respondent First National Bank of Chicago in 1933 took over the trusteeship of Otto Young's vast estate. It seized these trust assets solely upon the basis of the so-called consolidation provisions of the McFadden Act (44 Stat. 1225, 48 Stat. 190, U. S. C., T. 12, sec. 34(a)), which had been enacted many years after the testator's death. With the leverage of these provisions of the McFadden Act, and in contravention of Illinois law, the First National Bank had absorbed into the National banking system, under its Federal charter, a State bank and its fiduciaryships—a State bank which itself was administering Otto Young's trust without authority under the will.

Thus this Court is here concerned with whether the Congress intended, by the so-called consolidation provisions of the McFadden Act, to create an instrument of Federal power by which an Illinois bank and its fiduciaryships may without claim or pretense of authority under Illinois law be recruited into and absorbed by the National banking system under the Federal charter of the First National Bank and under paramount Federal control; and, whether such provisions were intended to override, as well, the contrary testamentary intent of the testator as reflected by his will which had become effective many years before passage of the McFadden Act.

When Otto Young died, in 1906, he named the First Trust and Savings Bank of Chicago, an Illinois corporation, as the sole trustee of his testamentary trust (R. 151). The will further provided (R. 157):

> "In the event that said trustee shall refuse to qualify or act, or further act as trustee under this will, for any cause, a successor in trust, or a new trustee, may be appointed by any court of competent jurisdiction, by and with the approval in writing of the appointee

> by not less than one-half (1/2) in number of my wife and children then living, and such new trustee so appointed shall have all the powers hereinbefore given to the original trustee named herein."

On February 11, 1929, the First Union Trust and Savings Bank, a new Illinois banking corporation, assumed administration of the Otto Young trust without judicial appointment (R. 403), despite the successorship provisions of the will so requiring, as above quoted. The First Union had been created as the result of a consolidation between the First Trust and the Union Trust Company, another State bank, pursuant to the Illinois Banking Act (R. 403). After administering the Otto Young trust for some four years, the First Union, on July 17, 1933, in contravention of Illinois law and solely under the consolidation provisions of the McFadden Act, merged into and was wholly absorbed by the First National Bank of Chicago, a preexisting National banking association, under the Federal charter of the First National (R. 403). Thereupon, without any judicial appointment the First National took over Otto Young's trusteeship and has been administering the trust without such authority until the present time (403), despite the requirements of the successorship provisions in the will (R. 403).

Neither the First Union nor the First National has at any time made a formal accounting of its administration of the Otto Young trust estate. The only judicial accounting ever given of this huge fund was made by the First Trust and that covered merely the period from the beginning of the trust to March 26, 1916 (R. 402). Since the First Trust failed to account for its stewardship of the trust from 1916 to 1929, it is apparent, in the words of the District Court, that (R. 427):

> "Thirty-three years of trust administration by three separate banks have passed since the last accounting."

The result of these developments is that during a thirty-three year period, encompassing two world wars, and including the inflation of the twenties, the great depression of the early thirties, and the war boom and inflation of the last decade, Otto Young's trust property, worth tens of millions of dollars, has passed from hand to corporate hand, without a formal accounting, and without judicial appointment, as contemplated by the will. The consequent hazards to the beneficiaries of this trust are manifest, especially when it is remembered that during part of that thirty-three year period here involved the First Union, whose trust department the First National acquired by merger, was exposed by high judicial authority in Illinois, in the case of *In Re Estate of Busby,* 288 Ill. App., 1937, 500, 525, 530, as being a bank which "disregarded the elementary and fundamental principles of executorship", and which was managed by a chief executive officer who was "not only imprudent and negligent but positively reckless" in dealing with the property of a widow and minor children.

The original plaintiff, Joseph de Korwin, having a beneficial interest in the trust estate through inheritance from his son, Stanley, a grandchild of Otto Young, made a written demand in 1943 upon the First National Bank for an accounting (R. 403, 427), which was refused (R. 403). Thereupon, the present suit was brought in which it was sought to have the so-called consolidation provisions of the McFadden Act construed and a ruling made as to their application in this case; to have the will construed so as to declare the beneficial interest of the plaintiff and all others similarly situated, and so as to declare that the First Na-

tional, and the First Union before it, acted without authority; and, to have the trust declared vacant, a successor trustee judicially appointed, and the First National made to account for the administration of itself and its predecessors, whose liabilities it had assumed (R. 147-149).

The First National not only resisted an accounting, in equity and good conscience long overdue, but also interjected itself into the strenuously litigated controversy among beneficiaries as to the interest in the trust of plaintiff and others similarly situated, a matter which could have had no effect upon the Bank's status as trustee nor upon its administration of the trust (R. 404, 406, 409).

While the suit was pending for trial, plaintiff died testate leaving all of his property to his widow, who became the substituted plaintiff, individually, and as executrix of his estate (R. 400).

The District Court declared that the plaintiff had a beneficial interest and was entitled to an accounting (R. 427), and this part of the holding was affirmed by the Court of Appeals (R. 495). With respect to the status of the First Union and the First National, the District Court held that these banks had no authority under Otto Young's will to act as trustee without having first secured judicial appointment. Since neither bank had been appointed by a court and inasmuch as the originally named trustee, the First Trust, had passed out of existence in 1929, a vacancy was created under the will which had never been filled pursuant to the testamentary provisions (R. 423). Basing its decision upon a construction of the successorship provisions in the will, and determining in substance that the First Union had no trusteeship to transfer to the First National as part of the 1933 merger, the District Court failed to reach questions as to the validity and

consequences of the merger of 1933 under the McFadden Act, and, therefore, had no occasion to construe the Act (Appendix, pp. 1-6).

The Court of Appeals reversed with respect to the banks' status as trustee (Appendix, p. 14), holding as to the 1929 transaction that under the Illinois rule of decision a unification by consolidation or merger does not of itself operate to create a vacancy in the trusteeship (R. 492), and that the successorship provisions of Otto Young's will are to be construed as not creating a vacancy in the trusteeship in the event of a valid consolidation or merger by the trustee (R. 493). The court held with respect to the 1933 unification that the so-called consolidation provisions of the McFadden Act were a source of authority for the First Union to merge with the First National and to transfer the trusteeship, and that such merger was not in contravention of Illinois law because Illinois had no statute which, in so many words, expressly prohibited the merger (R. 494). Finally, the court decided that although the testator, at the time of the execution of his will, and at the time of his death, could not lawfully have appointed the First National as trustee of his testamentary trust, nevertheless, by virtue of certain provisions of the Federal Reserve Act and by reason of the so-called consolidation provisions of the McFadden Act, both enacted many years after the testator's death, the testator must be charged under Illinois law with the artificial intent of having appointed the First National as his successor trustee (R. 495).*

Thus it is seen that the decision by the Court of Appeals with reference to the status of the First National Bank as trustee depends vitally upon a construction of

* That part of the Court of Appeals opinion which treats the consolidation issue and rests the right of the First National Bank to act as trustee on the McFadden Act is set out in full for convenient reference in the accompanying Appendix (pp. 7-14).

the so-called consolidation provisions of the McFadden Act, which, with the other matters involved, are set out and brought into clear focus in the form of questions presented by this petition.

**(D)**

**Questions Presented.**

The following widely important questions are presented by this petition:

(1) Are the so-called consolidation provisions of the McFadden Act, as amended in 1933 (44 Stat. 1225, 48 Stat. 190, U. S. C., T. 12, sec. 34 (a) ), to be construed as conferring powers of unification and integration upon State banks as well as upon National banks? In the absence of a grant of matching or corresponding power under the State law for State banks to unify and integrate with National banks, are these provisions of the McFadden Act to be construed as furnishing the authority for a State bank to do so? If so, has not Congress thereby trespassed upon a domain of activity reserved to the States under the Tenth Amendment? Are the constitutional powers of the Federal government enlarged in this regard solely in consequence of a failure by the State to grant such power to the banks of that State?

(2) Is the provision of the McFadden Act (44 Stat. 1225, U. S. C., T. 12, sec. 34 (a) ) that "no such consolidation shall be in contravention of the law of the State . . ." to be construed as if a special rule has been thereby created for the construction of State banking statutes,—a special rule designed to supersede the State rule for the construction of its banking statutes?

(3) In applying the provisions of the McFadden Act (44 Stat. 1225, 48 Stat. 190, U. S. C., T. 12, sec. 34 (a) ) that

no unification between a State bank and a National banking association shall occur "in contravention of the law of the State", does not the State law control in determining whether the type of unification contemplated by such provisions is that type of unification which State-created banks are empowered to enter into?

(4) Does a State rule of decision violate the due process clause of the Fourteenth Amendment if it makes Federal statutes enacted after the testator's death a basis for imputing to him an artificial intent to accomplish that which was prohibited by law when his will was executed and at the time of his death? If so, did the Court of Appeals violate the Fifth Amendment in applying such a purported State rule of decision?

Should the writ of certiorari issue in this case, petitioners will also present the following questions:

(a) What was the Illinois law concerning the question whether, on July 17, 1933, the First Union Trust and Savings Bank, an Illinois banking corporation, had power to unite and become integrated with the First National Bank of Chicago, a National banking association? Did the Court of Appeals follow such Illinois law?

(b) What was the Illinois law concerning the question as to the capacity and right of the First National Bank of Chicago to act as successor trustee under the testamentary trust of Otto Young following the purported unification and integration of that bank with the First Union Trust and Savings Bank? Did the Court of Appeals follow such Illinois law?

(c) Did the Court of Appeals correctly construe the provisions in the will of Otto Young relative to the appointment of a successor trustee when determining whether the First Union Trust and Savings Bank, from 1929 to

1933, and the First National Bank of Chicago, from 1933 to date, were authorized to act as successor trustees of his testamentary trust?

**(E)**

**Reasons for Allowance of Certiorari.**

Three principal reasons why this Court should grant certiorari in this case, pursuant to Rule 38, par. 5 (b), are that the Court of Appeals decided: (1) important questions of Federal law which have not been, but should be, settled by this Court; (2) Federal questions in ways probably in conflict with applicable decisions of this Court; and (3) important questions of local law in ways probably in conflict with local decisions.

**(1)**

The decision by the Court of Appeals in the instant case with reference to the status of the First National Bank as trustee rests in part, if not entirely, upon the premise that the so-called consolidation provisions of the McFadden Act should be construed as a manifestation of Congressional intent to confer powers of unification and integration, not only upon National banks, but also upon State banks—so that, as in the instant case, when the State law does not grant a matching or corresponding power to State banks to unify and integrate with National banks, such provisions of the McFadden Act are to be construed as giving that power to a State bank.

Petitioners contend that said provisions of the McFadden Act were never intended to confer powers upon State banks, but were meant to confer powers only upon National banks (see *post,* pp. 38-41)—*a matter upon which this Court has never passed.*

In determining how the so-called consolidation provisions of the McFadden Act are to be construed, it is necessary to consider whether it would be in contravention of the Tenth Amendment for Congress to attempt to endow State banks with the power to unite and become integrated with National banks when the State has not granted such power to State banks. Under these provisions of the McFadden Act the nature and extent of the State bank's unification and integration with the National bank is such that the State banking corporation abandons its name, transfers to the National bank all of its "rights, franchises and interests . . . in and to every species of property, real, personal and mixed, and choses in action thereto belonging", as well as "all rights of property, franchises and interests" held as a fiduciary; and, by continuing its existence under the Federal charter, the State bank subjects itself to the Federal government as the prime and paramount regulatory authority over its existence and affairs. By abandoning its name, transferring its property and fiduciaryships and by ceasing business and all of its functions as a State bank, the State bank has dematerialized itself into an anonymous and amorphous component of a National banking association under the supervening jurisdiction of the Federal government. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283.

The State has a vital interest in the existence, continued operation and strict regulation of State banking institutions in accordance with State public policy as expressed in its laws. Traditionally, the banking business has been viewed as so peculiarly impressed with a public interest that banks have come to be regarded as quasi-public institutions. The strict regulation of State banks is a matter of concern not only to the stockholders and depositors but to the public at large. *People* v. *Wiersema State Bank,* 361

Ill. 75, 87; *Continental Ill. Nat. Bank & Trust Co.* v. *The Peoples Trust & Sav. Bank,* 366 Ill. 366, 374; *Sneeden* v. *City of Marion, Ill.* (C. A. 7), 64 F. 2d 721, 726. Thus, while it may be assumed that Congress can exercise complete control over National banks as its own corporate creatures, a serious constitutional question arises when Congress seeks to place State banking institutions under Federal charter and jurisdiction and thereby absorb for the benefit of a National bank all property and functions of the State bank wholly without claim or pretense of State authority to do so. *This question has never been decided by this Court.*

The opinion by the Court of Appeals cites no Federal authority in support of its ruling that provisions of the McFadden Act confer powers of unification and integration upon State banks. However, as appears from the arguments of respondent Bank to the Court of Appeals (Appendix, pp. 30-42), the impression that the McFadden Act was intended to confer powers of unification and integration upon State banks as well as National banks, and that it was constitutional for Congress to do so, originates in the decision of the Supreme Judicial Court of Massachusetts in the case of *Worcester County Nat. Bank, Pet.,* 263 Mass. 444, 162 N. E. 217, and the decision of this Court affirming that judgment (*Ex Parte Worcester County Nat. Bank,* 279 U. S. 347).

In the course of its reasoning on whether the consolidation under consideration in the *Worcester Bank* case would contravene Massachusetts law, the Massachusetts court erroneously interpreted *Casey* v. *Galli,* 94 U. S. 673, as reaching a constitutional question, and as a holding that it was constitutional for Congress to empower State banks to transmute themselves into National banks whether or not in contravention of State law, and therefore, as being, *a fortiorari,* authority for the constitutionality of

those provisions of the McFadden Act purporting to authorize State trust companies to consolidate with National banks (162 N. E., at p. 220).

Upon appeal, this Court summarized the reasoning of the Massachusetts court in that regard, including the State Court's erroneous interpretation of *Casey* v. *Galli*, 94 U. S. 673. But since the parties did not pose the question whether the consolidation was valid (*post*, pp. 44-46), this Court perforce accepted the rule of decision of the Massachusetts court, that the consolidation under the McFadden Act did not contravene Massachusetts law, and inasmuch as it was unquestioned and unquestionable that the McFadden Act enabled the National bank to enter into the consolidation, this Court agreed with the conclusion of the Massachusetts court that the consolidation there under consideration was lawful (279 U. S., at p. 360; see discussion, *post*, pp. 44-46).

From the fact that this Court agreed with the conclusion of the Massachusetts court and summarized the reasoning of that court with respect to the legality of the consolidation, including its misconception of *Casey* v. *Galli* as being an authority upon a constitutional question, the misimpression has arisen that this Court's decision in *Ex Parte Worcester County Nat. Bank*, 279 U. S. 347, is a holding that it is constitutional for Congress to authorize State banks, without sanction of State law, to consolidate with National banks.

That the Massachusetts court was wrong in believing *Casey* v. *Galli* to be an authority on a constitutional question is shown by *Hopkins Fed. Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 341-343, where this Court said (p. 342):

> "No question of constitutional power was in the (*Casey* v. *Galli*) case."

The reasoning of the Massachusetts court clearly was based upon a faulty premise. And since the parties on appeal did not present any questions as to the validity of the consolidation, this Court's agreement with the conclusion of the Massachusetts court in that regard and this Court's summarization of the reasoning by the State court in that connection did not amount to a holding that the McFadden Act is to be construed as conferring powers of unification and integration upon State banking corporations, nor to a holding that, so construed, the McFadden Act was constitutional.

Many State courts, in addition to the Massachusetts court, have misinterpreted the scope and authoritative value of this Court's decisions in *Casey* v. *Galli*, 94 U. S. 673, or *Ex Parte Worcester County Nat. Bank*, 279 U. S. 347, or both. See, for example, *Hofheimer* v. *Seaboard Cit. Nat. Bk. of Norfolk*, 154 Va. 392, 153 S. E. 656, 657-658; *First Nat. Bank* v. *Harry E. Chapman Co.*, 160 Tenn. 72, 22 S. W. 2d 245, at pp. 245-246; *State* v. *First National Bank*, 57 N. Dak. 574, 579, 224 N. W. 161, 162; *In Re Watkins Estate*, 113 Vt. 126, 132, 30 A. 2d 305, 309 (decided after the *Hopkins Fed. Sav. & Loan Assn.* case). On the other hand, the Wisconsin Supreme Court, in *State ex rel. Cleary* v. *Hopkins St. B. & L. Assn.*, 217 Wis. 179, 175, 257 N. W. 684, 690 (affirmed *Hopkins Fed. Sav. & Loan Assn.* v. *Cleary*, 296 U. S. 315) recognized the case of *Ex Parte Worcester County Nat. Bank* as having limited authority.

See, also, *Com.* v. *Merchants Nat. Bk. of Allentown*, 323 Pa. 145, 185 Atl. 823, 825-826, where the Pennsylvania Supreme Court stated that under the doctrine of *Hopkins Fed. Sav. & Loan Assn.* v. *Cleary* it would be a violation of the Tenth Amendment for Congress to attempt to grant

to a Pennsylvania trust company authority to consolidate with a National bank when not sanctioned by State law.*

From the foregoing, it becomes plain that the questions here presented are of far reaching importance to the Congress, to the several State legislatures, to the Bench and Bar of Federal and State courts, and to the banking profession generally. Until this Court shall pass upon these questions, Congress will likely be misled as to the scope of its constitutional powers in the banking field and concerning the extent to which its intent has been reflected by the McFadden Act. State legislatures will be without guidance as to whether their existing statutes are effective to carry out State policy in preserving intact their State banking institutions. Federal and State courts may very well reach divergent results in this area, depending upon their respective views as to the meaning of *Casey* v. *Galli* and *Ex Parte Worcester County Nat. Bank*, in the light of the language of *Hopkins Fed. Savings & Loan Assn.* v. *Cleary*. The obvious effect of uncertainty in this field upon banking institutions requires no elaboration.

**(2)**

All three of the foregoing reasons for granting certiorari apply to the following questions presented by this petition:

(1) Is the provision of the McFadden Act (44 Stat. 1225, U. S. C., T. 12, sec. 34 (a) ), which reads, "No such consolidation shall be in contravention of the law of the State", to be construed as though a special rule has been created for the construction of State banking statutes, which special rule supersedes the State rule of construction of those statutes?

(2) In view of the provision of the McFadden Act that no unification between a State bank and a National banking association shall occur "in contravention

* In *Hopkins* v. *Cleary*, 296 U. S. 315, the Court by Cardozo, J., referred (p. 334n) to "Complementary Statutes" in many States in apparent recognition of the constitutional need for State enabling legislation.

of the law of the State", does the State law control in deciding whether the type of unification contemplated by the McFadden Act is the type of unification which State-created banks are empowered to enter into?

The Illinois Banking Act, in so many words, neither empowers nor prohibits unifications and integrations between Illinois banks and National banks, except that it authorizes a sale of assets by an Illinois bank to a National bank which assumes the former's liabilities (*post*, pp. 26-33). In no event do the Illinois statutes empower a State bank to enter into the type of unification contemplated by the McFadden Act, which, under Illinois law, would be regarded as a merger (see pp. 23-28, *post*). Under the fixed and received rule of construction applied by the Illinois Supreme Court to the Illinois Banking Act, failure to grant particular powers is deemed to be an express prohibition of the exercise of those powers (*post*, pp. 24-29; 32-33; 36-38).

The McFadden Act provides that such unification and integration shall not occur "in contravention of the law of the State". In view of the Illinois rule of construction, just noticed, it is manifest that the purported unification and integration, on July 17, 1933, of the First Union Trust and Savings Bank, an Illinois banking corporation, and the First National Bank of Chicago, a National banking association, was illegal under Illinois law, because it was not a sale and assumption agreement (*post*, pp. 26-33). Yet, the Court of Appeals in the case at bar upheld such unification and integration (R. 495), *thereby failing to follow local law.*

The decision by the Court of Appeals appears to be premised in part, if not entirely, upon the supposition that the provisions of the McFadden Act created a special statutory rule for construing the Illinois Banking Act—

as if the words "in contravention of the law of the State" were to be read "in contravention of the *statutes* of the State, *divorced and isolated from the rules of construction applied to those statutes by the Supreme judicial authority of the State.*" Thus, the decision below necessarily raises the question: Did Congress intend to create a special statutory rule of construction for State statutes? *This question has never been decided by this Court.*

Construing the McFadden Act as though State rules of construction are to be disregarded has the effect of frustrating the Congressional intent, under the McFadden Act, to make the State law predominate (*Ex Parte Worcester County Nat. Bk.*, 279 U. S. 347, 359-360), as a means of protecting the vital interests of the State in its corporate creatures, particularly its banking institutions (*ante*, p. 12; *post*, pp. 40-44). This construction of such provisions of the McFadden Act, if sanctioned and extended to other sections of the National Bank Act and to other Acts having similar language, might become a major device for defeating the intent of Congress to obtain harmony and bring about the concordant exercise of National and State power in the fields with which those statutes are concerned.

*The decision appears to be in conflict with deeply imbedded doctrines long and well established by the decisions of this Court.* It is axiomatic that statutes of a State are to be construed in accordance with the settled rules of construction of the supreme judicial authority in that State, and that such construction so made becomes a part of the statute as though physically incorporated into its text. *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32; *Leffingwell* v. *Warren*, 67 U. S. (2 Black) 599, 603. The *Knights of Pythias* case is direct authority for the proposition that where the exercise of corporate power under a Federal statute is made to depend upon whether it would "conflict with the laws . . . of the State", the quoted words are deemed to

refer not to the State statutes denuded of State judicial construction, but, rather, to the State statutes as construed in accordance with the rules of construction applied by the highest court of that State. Since the word "conflict", as used in the statute under consideration in the *Knights of Pythias* case, is synonymous with the word "contravention", as used in the McFadden Act, it appears that the ruling in the *Knights of Pythias* case should have been, but was not, followed by the Court of Appeals in the instant case.

The decision in the case at bar also appears to be in conflict with this Court's decision in *First National Bank* v. *Fellows ex rel. Union Trust Co.*, 244 U. S. 416, 426-428, which construed the words "when not in contravention of State or local law", as contained in Section 11(k) of the Federal Reserve Act (38 Stat. at L. 262, U. S. C., T. 12, Sec. 248(k) ), as authorizing the Federal Reserve Board to grant National banks power to act as fiduciaries *when the State law, as construed in accordance with State rules of construction, granted such powers to State banks.*

(3)

In holding that, under a supposed State rule of decision, a statute enacted after the testator's death is to be made a basis for imputing to the testator an artificial intent to do that which was unlawful at the time the will was executed and at the time of his death, *the Court of Appeals determined an important Federal constitutional question which this Court has not decided but should decide* (R. 495; App. 14). The Court of Appeals holding on this point is probably in conflict with the doctrine underlying *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 643-644. (See *post*, pp. 54-55).

Actually, the State rule of decision is not as represented by the Court of Appeals see pp. 52-54, *post*). If it were,

it would violate the Fourteenth Amendment (see *post*, pp. 54-55), and by applying a rule in violation of the Fourteenth Amendment the Court of Appeals *ipso facto* violated the Fifth Amendment.

A multitude of cases arising in connection with conveyances are likely to be affected by this erroneous doctrine. Not only would this rule be a matter of grave concern to testators, but also to trustors, grantors, assignors and other conveyancers who have made irrevocable transfers of property.

**(F)**

**Prayer.**

Wherefore, petitioners pray for the issuance of writs of certiorari to the Court of Appeals for the Seventh Circuit to review that part of its decision in the instant case partially reversing the decree of the District Court.

Respectfully submitted,

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## II.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### (A)

### Specification of Errors

Should writs of certiorari be issued, petitioners intend to urge that the Court of Appeals for the Seventh Circuit erred:

1. In construing the so-called consolidation provisions of the McFadden Act to be a manifestation of Congressional intent to confer powers of unification and integration not only upon National banks, but also upon State banks; in construing said provisions of the McFadden Act as providing power to a State bank to enter into a unification and integration with a National bank in the absence of the grant of a matching or corresponding power under State law for a State bank to do so; in holding, in effect, that said provisions of the McFadden Act, so construed, did not violate the Tenth Amendment, and that the constitutional powers of the Federal government are enlarged in the respects, aforesaid, merely by virtue of the failure of the State to grant such power to State banks;

(2) In construing the provision in the McFadden Act, "No such consolidation shall be in contravention of the law of the State", as if a special rule has been created for the construction of State banking statutes which supersedes the State rule of construction of said statutes;

(3) In holding, in effect, that the State law does not control in determining whether the type of unification and integration contemplated by the so-called consolidation

provisions of the McFadden Act is the type of unification which State banks are empowered to enter into;

(4) In holding that under a purported Illinois rule of decision Federal statutes enacted after the testator's death are to be made the basis for imputing to the testator an artificial intent to accomplish that which was prohibited by law when his will was executed and at the time of his death; in holding, in effect, that such a purported State rule of decision did not violate the due process clause of the Fourteenth Amendment; and, in failing to hold that to apply such a purported State rule of decision would violate the Fifth Amendment;

(5) In failing to hold that on July 17, 1933, the First Union Trust and Savings Bank, an Illinois banking corporation, had no power under Illinois law to unite and become integrated with the First National Bank of Chicago, a National banking association;

(6) In failing to hold that, under the Illinois law, the First National Bank of Chicago had no capacity or right to act as successor trustee under the testamentary trust of Otto Young following its unification and integration with the First Union Trust and Savings Bank;

(7) In construing the provisions of the will of Otto Young relating to the appointment of a successor trustee in such a manner as to hold that under Illinois law the First Union Trust and Savings Bank, from 1929 to 1933, and the First National Bank of Chicago, from 1933 to date, were duly authorized to act as successor trustees of Otto Young's testamentary trust; and

(8) In failing to follow the Illinois law with reference to the matters set forth in the preceding paragraphs numbered 4, 5, 6 and 7.

## (B)

## Argument.

MAY IT PLEASE THE COURT:

### (1)

**Under Illinois law, an Illinois bank is prohibited from effectuating, and in no event is empowered to effectuate, the unification and integration between State and National banks contemplated by the McFadden Act of 1927, as amended in 1933.**

The McFadden Act, insofar as material, provided:

> "Any bank incorporated under the laws of any State . . . may be consolidated with a National banking association located in the same . . . city . . . under the charter of such National banking association. . . . Upon such a consolidation, . . . the corporate existence of the constituent banks and National banking associations participating in such consolidation shall be merged into and continued in the consolidated National banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights, franchises, and interest of each of such constituent banks and National banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated National banking association without any deed or other transfer; and such consolidated National banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian

> of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation. . . . No such consolidation shall be in contravention of the law of the State under which such bank is incorporated." (44 Stat. 1225, 48 Stat. 190, U.S.C., T. 12, Sec. 34(a)).

It seems clear, from the express language of the McFadden Act, that the type of unification and integration contemplated is one where the State bank abandons its name, transfers all its property and fiduciaryships to the National bank, ceases business and all functions as a State bank, and continues existence in a dematerialized condition under the charter of the National bank which has absorbed it.

This type of unification and integration, though styled in the McFadden Act a consolidation, is identical with, or most closely resembles, a merger as defined by Illinois law.

There is a fundamental difference between consolidations and mergers under Illinois law. They are two distinct statutory methods of unifying corporations. In the case of consolidation, the uniting corporations are dissolved and pass out of existence in favor of a new corporation which supersedes them. In the case of a merger, one of the uniting corporations survives and absorbs the other. *Chicago Title & Trust Co.* v. *Doyle,* 259 Ill. 489, 493; *Chicago Title & Trust Co.* v. *Zinser,* 264 Ill. 31, 33-35.

There can be neither consolidation nor merger without statutory authority. As stated in the *Doyle* case (259 Ill. 489, 492):

> "Corporations are creations of the General Assembly, which grants to them such privileges and endows them with such powers as are deemed for the

public good. As a corporation must be created originally by statutory authority, any consolidation, purchase or merger by which it acquires the franchises of another corporation must also have statutory authority."

The Illinois Supreme Court's statement in the *Doyle* case is a mere reiteration of the general doctrine prevailing in this country from earliest jurisprudence. *Head & Amory* v. *The Providence Insurance Co.*, 6 U.S. (2 Cranch) 127, 167. Generally, see *Nat. Home Bldg. & Loan Assn.* v. *Home Sav. Bank*, 181 Ill. 35, 40.

Authority to consolidate is not the same as authority to merge. In this connection, the *Doyle* case held (259 Ill., pp. 495-496):

> "The consolidation in the case of *Scheidel Coil Co.* v. *Rose*, supra, was effected under the act in force March 26, 1873, as amended in 1887 and again in 1889 (Laws of 1889, p. 95) which simply provides for the consolidation of corporations. Neither in the title nor body of the act is there anything which would take a consolidation under it out of the ordinary and general rule that the constituent corporations cease to exist and a new one is created. That statute contains no authority for the merger of one corporation into another or for the purchase of the property, stock or franchises of one corporation by another, and it was held that a new corporation was created. The consolidation in this case was under the same act and necessarily our conclusion must be the same."*

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* Respondent bank, attempting to minimize the importance attached to the use by an Illinois statute of the word "consolidation", rather than the word "merger", as an authorized mode or manner of effecting a corporate unification, directed the attention of the Court of Appeals to certain language in the case of *C. & E. I. R. Co.* v. *Doyle*, 256 Ill. 514, 522 (R. 607). A casual reading of that language, taken out of context, might create an impression that the Illinois court regards the use of either term in a given statute as authorizing unification in both modes or manners, and that the difference in statutory language is of little importance. But this would be a serious misimpression. Upon closer analysis, this opinion merely conveys the thought that where a statute provides for unification in *every* mode and manner (other than by descent), including *both* consolidation and merger, arguments be-

The true nature of the transaction in the light of pertinent statutes, rather than the name by which the parties denominate the transaction, determines whether a consolidation, merger or other type of unification has been attempted under Illinois Law. *C.T. & T. Co.* v. *Zinser,* 274 Ill. 31, 34-35, and cases therein cited; *McRoberts* v. *Minier,* 270 Ill. App. 1, 10-11.

The Illinois Banking Act as it existed in 1933, the only Illinois legislation under which the 1933 unification and integration here involved might have occurred, provides for two, and only two, types of unification and integration: (1) a consolidation, and (2) a sale of assets by one bank to another which assumes the liabilities of the former, with the approval of the State Auditor. Ill. Rev. Stat., Smith-Hurd ed., 1933, Ch. 16½, Sec. 12. (Appendix, pp. 18-29).

In construing the consolidation provisions of Section 12 of the Illinois Banking Act in relation to a 1925 transaction, the Illinois Appellate Court, in the case of *McRoberts* v. *Minier,* 270 Ill. App. 1, followed the rules expressed by the

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tween the parties wherein they point to differences in the conventional forms of contracts customarily used to effectuate one or the other type of unification as a basis for their respective contentions that one or the other type had occurred, are of little importance in illuminating the issue for two reasons: first, the corporations involved had used both terms in their unification agreement; and, second, the court took notice of the fact that corporations in their agreements do not always use such terms with strict accuracy.

That the Illinois rule of decision is to require banking corporations, as well as all other corporations, to exercise corporate powers *only in the mode and manner prescribed by statute* is well established from earliest Illinois jurisprudence. *Metropolitan Bank* v. *Godfrey,* 23 Ill. 531 (originally at p. 579). *Fridley* v. *Bowen,* 87 Ill. 151, 154; *Diversey* v. *Smith,* 103 Ill. 378, 388; *McNulta* v. *Corn Belt Bank,* 164 Ill. 427, 445; *C. T. & T. Co.* v. *Doyle,* 259 Ill. 489, 492; *Cont. Ill. Nat. Bk. & Trust Co.* v. *Peoples Trust & Sav Bk.,* 366 Ill. 366, 374-377; *State Bank of Blue Island* v. *Benzing,* 383 Ill. 40, 54. See, also, *Calumet etc. Dock Co.* v. *Conkling,* 273 Ill. 318, 322-323; *Nat. Home Bldg. & Loan Assn.* v. *Home Sav. Bank,* 181 Ill. 35, 40-43. To the same effect with respect to National banks, see *Drover's & Mech. Nat. Bank* v. *First Nat. Bank,* (C.A. 4) 260 Fed. 9, 14; *Rural Agr. School Dist. No. 1* v. *Guardian Nat. Bank* (D.C.) 6 F. Supp. 482, 485.

Illinois Supreme Court in the *Doyle* case, just set forth, stating that when empowering legislation does not expressly give a power or right to unify and integrate, e.g., by consolidation or merger, "it is regarded as a prohibition against the exercise of such power" (citing *American Loan & Trust Co.* v. *Minnesota & Northwestern R. Co.*, 157 Ill. 641), and holding that the consolidation contemplated by Section 12 of the Illinois Banking Act was one where "the effect . . . is the dissolution of the constituent companies" which "cease to exist as legal entities" and where "a new corporation comes into existence" (270 Ill. App. 1, 11).

The fact that the parties in the *McRoberts* case "inadvisedly used the words 'consolidate' and 'consolidation' " was deemed to be of no importance by the Illinois Appellate Court (270 Ill. App., p. 10) since it is the true nature of the transaction, rather than the name by which it is called, which determines whether it meets the test of a consolidation under the Illinois statute.

When contrasted with the definition of consolidation as set forth by the Illinois Supreme Court in the *Doyle* case (259 Ill. 489, 493) and *Zinser* case (264 Ill. 31, 33-35), and by the Illinois Appellate Court in *McRoberts* v. *Minier* (270 Ill. App. 1, 10-11, construing the Illinois Banking Act), that is, that the uniting corporations are dissolved and pass out of existence in favor of a new corporation which supersedes them, it is indisputable that the type of unification provided for under the McFadden Act, as amended in 1933, *is one of merger, and is not to be considered a consolidation under the Illinois Banking Act.*

The *continuation of existence* by the constituent corporations under the McFadden Act manifestly is not the same as the *passing out of existence* under the consolidation provisions of the Illinois Banking Law. It is precisely this

difference which represents the fundamental distinction by definition between merger and consolidation under the Illinois Rule of Decision. Cf. *Atlantic & Gulf R.R. Co.* v. *Georgia,* 98 U.S. 359, 361,363; *Keokuk & W.R. Co.* v. *Missouri,* 152 U.S. 301, 305-310.

Absent Illinois legislation authorizing merger, the merger of respondent bank and the First Union was prohibited by the Illinois law (*American Loan and Trust Co.* v. *Minnesota and Northwestern Railroad Co.,* 157 Ill. 641) and, therefore, was *ipso facto* prohibited by the National Banking Act as being "in contravention of the law of the State."*

No comfort may be derived by respondent bank from the fact that the purported consolidation had the approval

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* Anticipating a possibility that respondent bank would see fit to argue to the Court of Appeals that Illinois banks were authorized to engage in mergers by virtue of inferences which might be drawn from the last three paragraphs of Section 12 of the Illinois Banking Act, added by amendment in 1929 (See Jones Ill. Stat. Ann., Vol. 2, par. 10-13), petitioners directed the Court of Appeals' attention to these paragraphs, showed that these were transplanted in *haec verba* from Section 73 of the Illinois General Corporation Act of 1919, as amended in 1921 (See Illinois Bus. Corp. Act Ann., 1934 ed., pp. 256-257), an act not applicable to banking corporations and which specifically authorized corporations within its purview to engage in mergers, leases, sales and exchanges, as well as consolidations, in contradistinction to the Illinois Banking Act, and demonstrated that under the Illinois rule of construction, as appears from *American Loan & Trust Co.* v. *Minn. & Northwestern R.R. Co.,* 157 Ill. 641, 650 (in accord, see *Kavanagh* v. *Omaha Life Ass'n.* (D.C.) 84 Fed. 295, 296), the powers of an Illinois banking corporation are not to be implied from these provisions which, on their face, do not purport to grant powers to the corporation but merely provide for the protection of interested parties in connection with any corporate unification and integration. This necessarily follows from the public policy in Illinois to regard the banking business as being impressed with a public interest and subject to strict regulatory legislation, *Continental Ill. Nat. Bk. & Trust Co.* v. *The Peoples Trust & Sav. Bk.,* 366 Ill. 366, 374, pursuant to which there has developed in Illinois the rule of construction which resolves against the banking corporation all ambiguities in the statutory grant of powers thereto. *People* v. *Wiersma State Bank,* 361 Ill. 75, 87-88. Cf. *Louisville & N. R. Co.* v. *Kentucky,* 161 U. S. 677, 684.

(Since respondent bank did not choose to make such argument and since the Court of Appeals ignored the question of whether the Illinois Banking Act authorized Illinois banks to engage in mergers as distinguished from consolidations, petitioners refrain from further amplification of the argument at this time.)

of the Illinois Auditor of Public Accounts. This act of approval was entirely without legal significance, as appears from the case of *American Loan and Trust Company* v. *Minnesota and Northwestern Railroad Company,* 157 Ill. 641, where, in disposing of a similar contention, the Illinois Supreme Court stated (p. 653):

> "In the case at bar there was no statute under which the consolidation could have been made, and the act of the Secretary of State in filing and recording the agreement for consolidation was wholly without warrant or authority of law, and consequently had no effect to either legalize the supposed consolidated company or give it the status of a *de facto* corporation."

Having demonstrated that the form of unification in 1933 was that of a merger, as was decided by the District Court below (84 F. Supp. 918, 923; R. 403, 428; also, *In re Estate of Busby,* 288 Ill. App. 500, 506; cf. *Defoe* v. *Board of Public Instruction* (C.A. 5) 132 F. 2d 971, 972), and that the purported merger was without sanction of State or Federal law, the *American Loan & Trust Company* case states the consequences from the standpoint of Illinois law (157 Ill. at p. 654): Under the Illinois Rule of Decision, the First National Bank of Chicago "is not, and never was, a corporation, either *de jure* or *de facto* . . . there was no corporation in existence with capacity to . . . contract or act . . ."* See also *State Bank of Blue Island* v. *Benzing,* 383 Ill. 40, 51-55.

Another ground for asserting that the 1933 "consolidation" was unlawful is the fact that the Illinois Banking

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* It is outside the scope of this case, and therefore unnecessary to decide, whether the First National Bank of Chicago exists as a National bank, under Federal law. Parenthetically, since the National bank existed prior to the unauthorized merger and, by virtue of the McFadden Act, continued its existence under its charter after the merger, it would seem that the legal existence of the National bank would remain unimpaired despite the illegality of the merger. See *Worcester County Nat. Bk., Pet.,* 263 Mass. 444, 162 N.E. 217, 221.

Act did not expressly authorize a unification (not even a consolidation) between a State bank and a National banking association. The manifest intent of the Illinois legislature in authorizing consolidations under Section 12 of the Illinois Banking Act was to make it possible for Illinois banks to consolidate with each other and to absorb and bring within the fold of the Illinois banking structure, and thus under Illinois regulatory control, those corporations doing business in Illinois which may have some banking powers but which were not organized to, and did not, conduct a general banking business under the Illinois Banking Act. This intent plainly emerges from Sections 12, 13, 2, 3, 4, 5 and 8 of the Illinois Banking Act (Smith-Hurd Ill. Rev. Stat., 1933, Ch. 16½, Sec. 12, 13, 2, 3, 4, 5 and 8; see Appendix, pp. 18-28) which sections, when read together, make clear that the requirements imposed upon corporations entering into a consolidation are as stringent and subject to the same degree of investigation and supervision by the State Auditor as in the case of an association of persons desiring to form an Illinois bank in the first instance; and, that the newly consolidated corporation becomes subject to the Illinois Banking Act as fully as if organized under the Act in the first instance.

The conclusion that the purpose of the consolidation provisions of the Illinois Banking Act was to bring banks into the fold of the Illinois banking structure and under Illinois' regulatory jurisdiction becomes irresistible when it is considered that the directors of the newly consolidated corporation, as an indispensable condition of such consolidation, must take an oath of fealty, including a promise not to violate nor to permit violations of the Illinois Banking Act (Sections 13 and 4), and when it is further considered that the newly consolidated corporation, being

subject to the Illinois Banking Act, is to be free of all visitorial powers except those prescribed by that Act (Section 8).

This construction of the consolidation provisions of the Illinois Banking Act finds support in the view taken by the Virginia Supreme Court of its banking laws in the case of *Hofheimer* v. *Seaboard Cit. Nat. Bk. of Norfolk,* 154 Va. 392, 153 S.E. 656, where the Virginia Court held (153 S.E., at pp. 657-658) that a statute authorizing a Virginia bank to merge or consolidate with a National bank did not contemplate that the National bank would absorb the State bank, as under the McFadden Act, but rather that the State bank was empowered to absorb the National bank and thereby bring it into the banking structure of the State, under the State's jurisdiction.

Such a construction of the Illinois Banking Act is strongly fortified by a consideration of the nature of its 1917 and 1929 amendments. Prior to 1917, no mention whatsoever was made in the Illinois Banking Act of a bank organized or incorporated under the laws of the United States. In 1917, two references were inserted into the Illinois banking laws concerning corporations or banks incorporated under the laws of the United States, the details of which are immaterial here. Harker's Ill. Stat. Ann., 1919 ed., Vol. 1, pp. 328, 338-339. By amendments made in 1929, banks organized or incorporated under the laws of the United States were referred to in Sections 12 and 15 (see Appendix accompanying this petition, pp. 23-27, 28-29). Under these amendments, a State bank was authorized, by vote of two-thirds of its directors and with the approval of the State Auditor, to sell all or part of its assets to another bank, including a National bank, if the latter assumed all of its liabilities except to its stockholders (Sec. 12); and

by virtue of such an assumption agreement, liquidation and dissolution of the State bank was facilitated (Sec. 15).

Notwithstanding that the legislature saw fit in 1917 and 1929 to amend the Illinois Banking Act so as to specifically refer to National banks in various connections, nothing was inserted in the Act purporting to authorize State banks to unite with National banks *except through the one specified method* of a sale of assets coupled with an assumption agreement, and then only when the State Auditor regarded such a transaction as necessary in order to protect the State bank's creditors.

It is well established law in Illinois that the power to unify by purchase and assumption is not the same as the power to unify by consolidation or merger (*Chicago Title & Trust Co.* v. *Doyle,* 259 Ill. 489, 495-496), and, further, that a corporation is prohibited from exercising any power not expressly granted to it. *Knass* v. *Madison & Kedzie Bank,* 354 Ill. 554, 561. Moreover, it is elementary that the grant of corporate power to do a certain thing in a particular mode or manner amounts to a prohibition to do the same in any other mode or manner. *The Metropolitan Bank* v. *Godfrey,* 23 Ill. 531 (originally at p. 579), 552; *Fridley* v. *Brown,* 87 Ill. 151, 154; *Diversey* v. *Smith,* 103 Ill. 378, 388; *McNulta* v. *Corn Belt Bank,* 164 Ill. 427, 445.

Since the legislature is presumed to have acted with knowledge of these rules when it made the 1917 and 1929 amendments (*People* v. *Hinrichsen,* 161 Ill. 223, 226; *Village of Glencoe* v. *Hurford,* 317 Ill. 203, 219), the conclusion is inescapable that by adding a power to unify through purchase and assumption, and *by refraining from adding a power to unify with National banks through any other means,* the legislature intended to leave in force the prohibition against unification with National banks through

any other method except the one specified in the 1929 amendment. That this is the way in which the Illinois Banking Act is to be construed after its amendment in 1929 is made clear in the recent case of *State Bank of Blue Island* v. *Benzing,* 383 Ill. 40, 53-55, in which the Illinois Supreme Court construes the 1929 amendment insofar as it authorizes an additional means of voluntary liquidation, and in which it reiterates and applies the rule that any power not expressly conferred is deemed to be prohibited. Cf. *Louisville & N.R. Co.* v. *Kentucky,* 161 U.S. 677, at pp. 686-689.

Thus, based upon the tenor of the Illinois Banking Act, taken as a whole, and in view of the implications arising from the fact and nature of the 1917 and 1929 amendments to the Act, it is clear that an Illinois bank is without authority to effectuate, and, therefore, is prohibited from effectuating, any kind of unification and integration with a National bank other than the one expressly provided for under the Act, i.e., a sale of its assets coupled with an assumption agreement.

The opinion of the Court of Appeals in the case at bar cites three Illinois authorities for the proposition that Illinois law would not be contravened by the unification and integration here involved under the McFadden Act: a dictum in *McRoberts* v. *Minier,* 270 Ill. App. 1, 10, and a holding in *First National Bank* v. *Lindberg,* 293 Ill. App. 474, 481 (both decisions being by an intermediate court of appeals in Illinois), and an opinion by the Attorney General of Illinois in 1927.

The question in the *McRoberts* case was whether a form of liquidation agreement entered into between a State bank and a National bank in 1925, *before the McFadden Act,* could be regarded as a consolidation under the Illinois Bank-

ing Act. The Illinois Appellate Court held that it could not, since at that time, before the McFadden Act, National banks had no authority under Federal law to consolidate with State banks; moreover, that the transaction, upon analysis, would not qualify as a consolidation under Illinois law because no new corporation arose by virtue thereof and the State bank was continued in existence. Purely as dictum, and in complete error as here shown, the Court in the *McRoberts* case made the unsupported and unsupportable assertion that an Illinois bank had authority to consolidate with a National bank insofar as Illinois law was concerned.

In the *Lindberg* case, the question before the Illinois Appellate Court was whether a mortgagor in a foreclosure suit could escape enforcement of the mortgage lien on his property upon the ground that the substituted plaintiff, the First National Bank of Chicago, was not the indenture trustee and its succession thereto was founded upon an illegal consolidation under the McFadden Act. The court held that the mortgagor could not evade foreclosure and that under these circumstances his attempt to do so amounted to a collateral attack upon the consolidation, relying upon that part of the decision in *Casey* v. *Galli*, 94 U. S. 673, 679-680, which so held. See *Gray* v. *First Nat. Bk.*, 294 Ill. App. 62, 71. Since the foreclosure suit was brought by a proper plaintiff in the first instance and, therefore, the jurisdiction of the equity court over the defendant and his property had attached, it is manifest that the equity court could have enforced the mortgage lien whether or not the First National Bank of Chicago was a properly substituted plaintiff. See *Gray* v. *First Nat. Bk.* 294 Ill. App. 62, 68. Therefore, it was of little importance that the court incidentally held that the McFadden Act authorized the consolidation upon which the First National

Bank's status as substituted plaintiff depended. In so holding, the court observed that nothing had been called to its attention requiring specific authorization under Illinois law to legalize the consolidation, thereby implying that under the court's construction of the Illinois law there was no authorization for the Illinois bank to consolidate with the National bank.

The opinion of the Illinois Attorney General cited by the Court of Appeals (Opinion No. 1125, July 26, 1927), misconceiving the scope of the authority of *Casey* v. *Galli*, 94 U. S. 673, stated that the McFadden Act of 1927 permitted a consolidation between Illinois banks and National banks, and that the Attorney General had failed to find any provision of the State Banking Act which would be contravened thereby. Apart from the fact that the opinion of the Illinois Attorney General put a misplaced reliance upon *Casey* v. *Galli*, it is not authoritative as to Illinois law in view of the force of many decisions of the Illinois Supreme Court with which it is in conflict. Moreover, the Attorney General's opinion was expressed before the 1933 amendment to the McFadden Act, which changed the character of unification and integration contemplated by the Act from that of consolidation to that of merger, as regarded by Illinois law. The element of the Attorney General's opinion which is of prime significance to the instant case, and which the Court of Appeals appears to have overlooked, is that part defining the consolidation authorized under Illinois law to be one in which "the constituent corporations by operation of law cease to exist" in favor of a "new corporation".

It may be seen, then, that these three Illinois authorities, relied on by the Court of Appeals, being opposed to the force of numerous Illinois Supreme Court decisions,

cannot be deemed authoritative even as to whether a *consolidation* between Illinois and National banks would contravene Illinois law, let alone whether the *merger* contemplated by the McFadden Act, as changed in 1933, would do so. Obviously, the *McRoberts* case dictum and the 1927 opinion of the Illinois Attorney General did not reach the merger question because they were concerned with transactions before 1933. And since the merger question was not raised, briefed or argued by the parties, nor considered by the Court, in the *Lindberg* case, it is elementary that this case could not be authority on the point. *Hopkins Fed. Sav. & Loan Ass'n* v. *Cleary,* 296 U. S. 315, 342-343.

The true import of the *McRoberts* decision and the 1927 opinion of the Illinois Attorney General is, at most, that Illinois banks may enter into unifications under which the constituent banks pass out of existence in favor of a new corporation, and, therefore, by necessary implication, that Illinois banks cannot enter into the unification and integration contemplated by the McFadden Act after the 1933 amendment, under which no new bank comes into being and the State bank continues its existence in a dematerialized form—a type of unification and integration which can be characterized only as a merger under Illinois law.

Apart from the fact that the *Lindberg* case did not consider or decide whether Illinois banks may enter into mergers, as distinguished from consolidations, it will be seen that the *Lindberg* case is not authoritative even with reference to the power of an Illinois bank to enter into consolidations with National banks, in view of its implied recognition that the Illinois Banking Act granted no specific authority to Illinois banks to consolidate with National banks. Manifestly, the holding of the *Lindberg* case, that consolidation was permissible despite lack of specific au-

thority therefor under the Illinois Banking Act, was wholly at variance with a long and uninterrupted line of decisions by the Illinois Supreme Court, decided *both before and after* the *Lindberg* case, all of which are unequivocally to the effect that any power not granted to an Illinois bank or other corporation is deemed to be expressly prohibited, as much as though such prohibition were physically incorporated into the text of the statute itself. *People* v. *Wiersema State Bank,* 361 Ill. 75, 87, 94; *American Loan & Trust Co.* v. *Minn. & N.W.R. Co.,* 157 Ill. 641, 651, 654; *Knass* v. *Madison & Kedzie Bank,* 354 Ill. 554, 561-562; *Continental Ill. Nat. Bank & Trust Co.* v. *The Peoples Trust & Savings Bank,* 366 Ill. 366, 374-375; *State Bank of Blue Island* v. *Benzing,* 383 Ill. 40, 52-53.

The Court of Appeals for the Seventh Circuit in other cases had no difficulty in finding and applying this bed rock rule of Illinois law with reference to the powers of Illinois banks, as appears from the text of those decisions and particularly from the Illinois decisions therein cited, especially *People* v. *Wiersema State Bank,* 361 Ill. 75. See *Sneeden* v. *City of Marion* (C.A. 7), 64 F. 2d 721, 726; *Granzow* v. *Village of Lyons, Ill.,* (C.A. 7), 89 F. 2d 83, 85; *LaParr* v. *City of Rockford, Illinois,* (C.A. 7), 100 F. 2d 564, 566-567; *Joseph* v. *Village of Downers Grove,* (C.A. 7) 104 F. 2d 974, 979. The Supreme Court, itself, recognized this rule of Illinois law in affirming the *Sneeden* case ( *Marion* v. *Sneeden,* 291 U. S. 262, 269). To the same effect, see *Farley* v. *Albers* (App. D.C.) 112 F. 2d 401, 403.

That the Illinois Appellate Court, in the *McRoberts* and *Lindberg* cases, and the Illinois Attorney General, in his 1927 opinion, were not applying any doctrine of Illinois law in suggesting that no prohibition arises from the failure to grant a corporate power is demonstrated from the

case of *Alexander* v. *Bankers Union of Chicago,* 187 Ill. App. 469, 476-477, where precisely the same contention was made and rejected.

**(2)**

**The McFadden Act was never intended to confer powers upon State banks, but only upon National banks. Any other construction would render the McFadden Act unconstitutional.**

Having demonstrated that the Illinois Banking Act, as construed in accordance with well established rules of construction applied by the Supreme Court of Illinois, prohibits the purported unification and integration of 1933 involved in this case, and having shown that the Court of Appeals for the Seventh Circuit knew and had applied the Illinois rule of construction no less than four times prior to its opinion in the case at bar, it seems clear that its disregard of the Illinois rule of construction in the case at bar must be predicated upon two assumptions: *First,* that the McFadden Act was intended to confer powers, not only upon National banks, but upon State banks as well; and, *Second,* that State banks were authorized to act under the Federal grant of power in the McFadden Act unless such action would be "in contravention of the laws of the State," and that these quoted words were to be read as though they meant "in contravention of the statutes of the State, divorced and separated from the rules of construction applied to said statutes by the Supreme judicial authority of the State." Petitioners will show that both of these propositions are erroneous, dealing with the first under this point, and discussing the second under point (3), *post.*

The Court of Appeals, in adopting the view that the McFadden Act purported to give powers to State banks, over-

looked a most significant fact: **that the whole tenor of the National Bank Act is to confer powers exclusively upon National banks.** Like Illinois banks, National banks have only such powers as their legislative creator has bestowed upon them, and any power not granted is deemed to be prohibited. *Texas & P. R. Co.* v. *Pottorff*, 291 U. S. 245, 253. If the McFadden Act is to be read as though it were intended to confer express power upon State banks, where may a grant of power to the National banks to enter into these unifications be found? Does it not seem absurd that Congress intended to confer express power upon State banks and forgot to confer express power upon its own creatures, the National banks, leaving the National banks in the ignominious position of having to seek out their power, if any, from implications arising out of the grant of power to State banks?

Such a construction is certainly not a necessary one. It is a fundamental principle that there must be legal ability to enter into a transaction on the part of each party thereto. *Louisville & Nashville Rd.* v. *Kentucky*, 161 U. S. 677, 691-692. It would be of no avail for a State bank to have the ability to enter into a unification with a National bank if the National bank was without power from its creator to do so, and vice versa. *McRoberts* v. *Minier*, 270 Ill. App. 1, 10.* Normally, each sovereign grants power to its own, and each party, having matching or corresponding power from its creator, is thus enabled to enter into a legal transaction. *Louisville & Nashville Rd.* v. *Kentucky*, 161 U. S. 677, 691-692. It may be logically assumed, therefore, that the pri-

* In *Com.* v. *Merch. Nat. Bank*, 1936, 323 Pa. 145, this precise point was passed on, where the Pennsylvania Supreme Court said (p. 151). "The Federal legislation, while evidencing the terms and conditions of Federal consent to the absorption of a State bank by a National bank, did not, and because of the Tenth Amendment to the Federal Constitution (*Hopkins* v. *Cleary*, 296 U. S. 315) could not, confer authority on the trust company to consolidate its franchises and property with those of the bank. What was lacking to make the consolidation *de jure*, was authority from the commonwealth pursuant to whose law the trust company existed."

mary purpose of Congress in enacting the McFadden Act was to bestow matching or corresponding power upon its own creature, the National bank—a construction which comports with the normal and the probable and is consistent with the mutual deference displayed between sovereigns in fields of concordant exercise of National and State power. *First National Bank* v. *Fellows ex rel. Union Trust Co.*, 244 U. S. 416, 426-428.

If that be the primary purpose of the Statute, it becomes highly questionable, in the light of this new perspective, to imply from the grant of power to the National bank an intent to grant power to the State bank. Apart from the doubtful constitutionality of any attempt by Congress to grant powers of such far reaching consequences to State banks, the language of the statute strongly militates against such a construction. In clause after clause the so-called consolidation provisions of the McFadden Act recite an explicit intent to make the State law predominate, preserving to the States not only the right to dictate whether the State bank may consolidate, but also the right to prescribe the percentage of the State bank's stockholders who must approve the proposed consolidation, the amount of notice to its stockholders, and the mechanics by which dissenting stockholders may have their interests liquidated. Moreover, the intent to make the State law predominate is manifested in the express preservation of the right of State courts to remove the consolidated bank as a successor fiduciary when such removal is not effected to discriminate against National banks.

These repetitive expressions of Congressional intent to make the Federal law subservient to State law has persuaded this Court that the paramountcy of State law was intended to be extended to all consequences of consolidation, even though the Act did not so specifically state. Thus, insofar as the consequences of a McFadden Act consolida-

tion are concerned, this Court has held that State law was intended to be paramount, not merely with respect to the right to remove the consolidated bank as successor fiduciary, but also in respect of the right to prevent the consolidated bank from succeeding to the fiduciaryships in the first instance, despite the language of the Act purporting to make such succession automatic and subject only to the right of removal. *Ex Parte Worcester County Nat. Bank,* 279 U. S. 347, 359-360. For the same reasons, having in mind that such a construction would be unnecessary and a departure from the normal, as well as of questionable constitutionality, it seems far fetched to attribute to Congress an intent to recruit State banks by bestowing powers of unification and integration upon them which the State of their creation failed to grant and which, in Illinois, is thereby deemed to have been prohibited.

The construction which has been placed upon the consolidation provisions of the McFadden Act by the Court of Appeals in the instant case raises a constitutional question. That is, if the Act is intended to grant powers of unification and integration to State banks in the absence of powers granted by the State, has not Congress overstepped the bounds of constitutional propriety?

A misconceived doctrine has evolved from language appearing in the case of *Casey* v. *Galli,* 94 U. S. 673, 678, relating to the conversion of a State bank into a National bank, to the effect that it was the holding there that it was constitutional for Congress to grant power to a State bank to transmute itself into a National bank and, therefore, *a fortiori,* that it was constitutional for Congress to grant a State bank power to unify and integrate with a National bank. The proponents of this doctrine cite *Ex Parte Worcester Nat. Bank,* 279 U. S. 347, as their authority. But this Court, in *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary,* 296 U. S. 315, 334, 341-343, has cut the ground out from

under this doctrine by distinguishing the case upon which it is founded, *Casey* v. *Galli*, as a decision not reaching a constitutional question.

Moreover, the decision in *Ex Parte Worcester Nat. Bank*, on proper analysis, will be seen as not passing upon the question as to whether, if construed as conferring the power of unification and integration upon State banks, the McFadden Act would overstep the bounds of constitutional propriety. Therefore, as between the cases of *Casey* v. *Galli*, *Ex Parte Worcester Nat. Bank* and *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary*, the latter is the only decision of the three having any quality of authority with reference to the constitutional limits of Congressional action in attempting to grant powers to State corporations.

If the McFadden Act were intended to grant powers of unification and integration to State banks in the absence of authorization by the State, as construed by the Court of Appeals in the instant case, then the broad reasoning which impelled this Court to strike down Section 5(i) of the Home Owners Loan Act in the case of *Hopkins Fed. Sav. & Loan Assn.* v. *Cleary*, should lead this Court to reject the construction placed upon the McFadden Act by the Court of Appeals in the instant case.

Closely comparable to the critical question presented in the *Hopkins* case (296 U. S., at p. 336), the crucial question here is whether the power of Congress to create National banks and invest them with corporate capacity carries along with it the constitutional right to enable a State bank, without sanction under State law, to abandon its name, transfer all of its property and fiduciaryships, cease business and all functions as a State bank, and lead a dematerialized existence under the Federal charter of a National bank which absorbed it and is under the primary regulatory control of the Federal government. The language of the *Hopkins Fed.*

*Sav. & Loan Ass'n.* case seems especially illuminating in passing upon this question (296 U. S., at pp. 336, 337, 338, 339):

> "They (in that case, State building and loan associations) have been given corporate capacity in the belief (end of p. 336) that their creation will advance the common weal. The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi-public instruments. . . . They may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it. . . . How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred (p. 337) . . . The destruction of associations established by a State is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends (pp. 338-339) . . ."*

Notable, too, in line with this Court's quoted observations, is the fact that public policy in Illinois attaches prime

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* While the *Hopkins Fed. Sav. & Loan Ass'n* case did not purport to decide whether its doctrine would apply to the banking field, yet there seems to be no reason why it should not, and it is noteworthy that in making the statement quoted in the text above, this Court took occasion to make footnote reference to a case involving the interrelationship of National and State banks, intimating that the doctrine applies to the banking field as well. See 296 U.S., at p. 339, fn. 6. Moreover, if this Court had any misgivings as to whether the broad doctrine of constitutional limits on Congressional action expressed in the *Hopkins Fed. Sav. & Loan Ass'n.* case were applicable to the banking field, it is extremely difficult to rationalize the lengths to which this Court went, not merely to distinguish the *Casey* v. *Galli* case on the ground it related to the banking field, but to subject that case to a rigorous analysis designed to destroy the misimpression that it decided a constitutional question. This precaution would have been totally unnecessary if the banking business were deemed to have provided a basis of distinction sufficient unto itself.

importance to any change in sovereign control over the affairs of banking institutions, as appears from *Penn* v. *Fogler*, 182 Ill. 76, 98, 104; *People* v. *Brady*, 271 Ill. 100, 112-113.

As opposed to the force of the reasoning in *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary*, the proponents of the supposed doctrine of *Casey* v. *Galli*, rely upon the holding of *Ex Parte Worcester County Nat. Bank*, 279 U. S. 347. That case came up for review on an appeal by the Worcester County National Bank from a decree of a Massachusetts State Court under Section 237(a) of the Judicial Code, as amended (43 Stat. at L. 936, 937, U. S. C., T. 28, Sec. 344(a)). The holding of the Massachusetts court, made without benefit of any briefs or arguments in opposition to the bank (see Mo. and Bf. of Mass. Atty. Gen'l case No. 469, this court, Oct. Term, 1928), involved two findings: *First*, that it was the rule of decision in Massachusetts that a Massachusetts trust company could consolidate with a National bank pursuant to the McFadden Act, in that such consolidation would not be in contravention of Massachusetts law, even though there was no State legislation which granted such power.* *Second*, that the McFadden Act of 1927 was unconstitutional to the extent it purported to make the consolidated National bank the automatic successor to the State trust company as executor, in that such a succession could not occur without judicial appointment under Massachusetts law.

On its appeal to this Court in the *Worcester Bank* case, the consolidated National bank did not question the propriety of the Massachusetts court's determination that its

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* In reaching this conclusion, the Massachusetts court reviewed the public policy of the State as expressed in its statutes and decisions, and found, in substance, that the public policy had favored and apparently still favored transmutations and, *a fortiori*, consolidations as well. *Worcester County Nat. Bk., Pet.*, 263 Mass. 444, 162, N.E. 217, 218-220.

consolidation was valid, since, in that respect, the holding was in its favor. The bank limited its challenge to the second determination, that the McFadden Act was unconstitutional, taking the position that the provisions of the Act for automatic succession by the consolidated National bank to the State trust company's executorships were constitutional, even though such provisions, as construed by the Massachusetts court, were designed to override Massachusetts law. (See Appellant's Bf., in case No. 469, this Court, Oct. Tm., 1928.)

The Attorney General of Massachusetts, as the only party in opposition to the appellant bank, sought merely to uphold the decision of the Massachusetts court against the attack of the appellant, not raising any question as to validity of the consolidation. (See Motion and Bf. of Mass. Atty.-Gen'l. in Case No. 469, this Court, Oct. Tm., 1928.) Thus, the only issue presented by the parties for review there was whether the McFadden Act of 1927 was unconstitutional to the extent it had been construed to make the consolidated National bank the automatic successor to the State trust company as executor in contravention of Massachusetts law. Since the parties did not pose to this Court any question as to the validity of the consolidation, it seems plain that little, if any, importance can be attached to the circumstance that this Court summarized the State Court's reasoning which had led the latter to conclude that the consolidation was valid.

In short, upon appeal in the case of *Ex Parte Worcester County Nat. Bk.* presenting for review the sole question as to the right of the consolidated National bank to succeed automatically to an executorship as the result of a McFadden Act consolidation, this Court, as pointed out in *State ex rel. Cleary* v. *Hopkins St. B. & L. Asso.*, 217 Wis. 179, 195, 257 N. W. 684, 690, accepted as the rule

of decision in Massachusetts the determination by the Supreme Judicial Court of Massachusetts that the consolidation did not contravene Massachusetts law. Since the Massachusetts court held that Massachusetts law was not contravened by the consolidation, and inasmuch as it was unquestioned and unquestionable that the McFadden Act authorized the National bank to enter into the consolidation, this Court agreed with the conclusion of the Massachusetts court that the consolidation was valid and went on to consider the only issue presented upon review, the extent to which the McFadden Act dictated the consequences flowing from a consolidation under it.

With reference to the latter issue, this Court avoided considering whether the McFadden Act, as construed by the Massachusetts court, would be unconstitutional, since it held that the Massachusetts court had misconstrued the Act. The holding of this Court thus emerges as one not deciding any of the constitutional questions involved in the instant case, and certainly is in no way inconsistent with the later decision of *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary,* 296 U. S. 315. Moreover, by saying that the construction adopted here, as opposed to that of the Massachusetts court, "makes it possible . . . to . . . preserve the *constitutional* effectiveness" of the so called consolidation provisions of the McFadden Act (279 U. S., at p. 362), this Court strongly implied that if Congress had intended to override Massachusetts law, these provisions of the McFadden Act would be unconstitutional, presumably upon the same considerations given more explicit and elaborate expression in the later case of *Hopkins Fed. Sav. & Loan Ass'n.*

That it would be a transgression of the Tenth Amendment for Congress to attempt the endowment of State banks with such far reaching powers as those of unification and inte-

gration contemplated by the McFadden Act not only follows from the broad doctrine of *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary,* but is made clear by other Federal and State authorities. In the case of *Fulton* v. *Lloyds Cas. Co.,* (C. A. 6) 75 F. 2d 295, the Court said (p. 297): "... the powers of a State bank cannot be enlarged by the Federal law ..." In *Farley* v. *Albers,* (App. D. C.) 112 F. 2d 401, the Court said (p. 403): "And we are admonished in the opinion in the *Pottorff* case (291 U. S., at p. 257, fn. 11)—which we are told is still to be accepted as the law—that Congress cannot make valid a pledge by a State bank where the power is lacking under its charter or the laws of the State." And in *Com.* v. *Merchants Nat. Bk. of Allentown,* 323 Pa. 145, 185 Atl. 823, the Court said (p. 826): "The Federal legislation, while evidencing the terms and conditions of Federal consent to the absorption of a State bank by a National bank, *did not, and because of the Tenth Amendment to the Federal Constitution* (*Hopkins Federal Savings & Loan Ass'n.* v. *Cleary* . . .) *could not,* confer authority on the trust company to consolidate its franchise and property with those of the bank."

In summary, it is clear that the construction given the McFadden Act by the Court of Appeals in the instant case, that it was intended to endow State banks with powers of unification and integration not granted to them by State law, is a construction wholly unnecessary, a radical departure from the normal and the likely, and is not only barren of support under precedents but also seems to be precluded on constitutional grounds, as seen from the authority of this Court, other Federal courts and the Supreme Court of Pennsylvania.

(3)

**The McFadden Act is not to be construed as though a special rule has been created for the construction of State banking statutes which supersedes the State rule of construction of such statutes.**

In upholding the merger, the Court of Appeals in the instant case disregarded the Illinois rules of construction, well known to the Court from four of its own previous decisions, thereby ruling, in effect, that the Illinois Banking Act is not to be construed according to Illinois rules of construction, but rather according to a special rule of construction created by the McFadden Act—as though the words in the McFadden Act, "in contravention of the laws of the State" were to be read "in contravention of the statutes of the State, divorced and isolated from the rules of construction applied to such statutes by the Supreme judicial authority of the State."

Petitioners contend that this further construction of the McFadden Act is unnecessary and represents a marked departure from the normal and the likely. Moreover, it conflicts with deeply imbedded doctrines long and well established by the decisions of this Court.

That this construction is unnecessary and represents a radical departure from the normal and the likely clearly appears upon recurrence to rudimentary principles. It is fundamental and normal that corporate creatures of different sovereigns may deal with each other only if each has been endowed by its creator with power to do so. *Louisville & Nashville Rd.* v. *Kentucky,* 161 U. S. 677, 691-692. It is to be assumed, therefore, that the primary purpose of the McFadden Act was to create authority for National banks, even if, *arguendo,* its secondary purpose was to create a source of power for State banks as well. In accomplishing

this supposed secondary purpose, great weight must be attached to the *caveat* of Congress that State banks are not to exercise powers granted under the McFadden Act if to do so would violate State law. Normally, State law is what the State declares it to be, not merely through its statutes, but also through its courts. *Leffingwell* v. *Warren,* 67 U. S. (2 Black) 599, 603; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32. It is a novel doctrine, to say the least, which would attribute to Congress an intent to construe State statutes, not as the courts of the State construe them, but according to the literal meaning of the naked State statutes. There is certainly nothing in the McFadden Act which compels a court to take such a distorted view of State public policy.

The construction placed upon the so-called consolidation provisions of the McFadden Act by the Court of Appeals in the instant case appears to be in conflict with deeply imbedded doctrines long and well established by the decisions of this Court. A very similar problem was presented in *Knights of Pythias* v. *Meyer,* 265 U.S. 30, where the exercise of corporate power under a Federal statute was made to depend upon whether it would "conflict with the laws . . . of any State." Since there is no material difference between the quoted words of the statute in that case and the pertinent words of the McFadden Act here under scrutiny, that is, "in contravention of the laws of the State", it is manifest that the decision in the *Knights of Pythias* case is authoritative on how these words are to be construed. In that case this Court said (265 U.S., at pp. 32-33):

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein. See, for example, *Leffingwell* v.

*Warren*, 2 Black 599, 603, 17 L. Ed. 261, 262; *Green* v. *Neal*, 6 Pet. 291, 297-300, 8 L. ed. 402, 404-406. And we follow the state construction even though it may not agree with our own opinion. *Carroll County* v. *United States*, 18 Wall. 71, 82, 21 L. ed. 771, 775; *Shelby* v. *Guy*, 11 Wheat. 361, 367, 6 L. ed. 495, 496; *Tioga R. Co.* v. *Blossburg & C.R. Co.* 20 Wall. 137, 143, 22 L. ed. 331, 334."

Equally authoritative, and strongly opposed to the construction made by the Court of Appeals in the instant case, is this Court's holding in *First National Bank* v. *Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 428, where the Court construed Section 11(k) of the Federal Reserve Act (38 Stat.. 251, 262, U.S.C., T. 12, Sec. 248(k)) under which the Federal Reserve Board was authorized to empower a National bank to act as a fiduciary "when not in contravention of State or local law." Those words, almost identical with the provision in the McFadden Act, were construed to make the exercise of the Federal Reserve Board's power dependent upon whether the **State law** expressly or impliedly **granted** similar power to State institutions—an inquiry which of necessity requires examination of the State statutes as construed and applied by the State courts. *Sneeden* v. *City of Marion* (C.A. 7) 64 F. 2d 721, 726, affirmed, *Marion* v. *Sneeden*, 291 U.S. 262, 269; *Granzow* v. *Village of Lyons, Illinois*, (C.A. 7) 69 F. 2d 83, 85; *LaParr* v. *City of Rockford, Illinois*, (C.A. 7) 100 F. 2d 564, 566-567; *Joseph* v. *Village of Downers Grove*, (C.A. 7) 104 F. 2d 974, 979; *Farley* v. *Albers*, (App. D.C.) 112 F. 2d 401, 403.

**(4)**

**By imputing to the testator an intent derived solely from statutes enacted after his death, the Court of Appeals failed to follow the Illinois rule of decision and violated the Fifth Amendment.**

The Court of Appeals in the instant case held, apparently in reliance upon *Chicago Title and Trust Company* v. *Zinser,* 264 Ill. 31, that the testator "was charged with knowledge not only that a consolidation might occur in Illinois under Illinois law but also that it might occur likewise by virtue of a federal statute *thereafter enacted.*" (R. 495). This is a ruling that the testator is charged with knowledge of the contents of statutes which came into existence many years after his death, that is:

(a) Section 11(k) of the Federal Reserve Act (38 Stat. 261, 262) as amended by Act of September 26, 1918 (40 Stat. 968, U. S. C., T. 12, Sec. 248(k)) which, *twelve years after testator's death,* for the first time authorized National banks to exercise trust powers in Illinois. See *People* v. *Brady,* 271 Ill. 100, 111, which prohibited the exercise of such powers in Illinois before that time.

(b) The McFadden Act of 1927 (44 Stat. 1225, U. S. C., T. 12, Sec. 34(a)), which, *twenty-one years after the testator's death,* for the first time authorized National banks to consolidate with State banks in Illinois. See *McRoberts* v. *Minier,* 270 Ill. App. 1, 10.

(c) The McFadden Act, as amended in 1933 (44 Stat. 1225, 48 Stat. 186, 190, U. S. C., T. 12, Sec. 34(a)) which, *twenty-seven years after the testator's death,* provided the First National Bank of Chicago in the instant case with authority to enter into the merger here involved.

Moreover, it was under the provisions of the McFadden Act of 1927, *enacted twenty-one years after testator's death,* that a statutory basis was first created for re-

spondent bank's claim that by virtue of the merger in 1933 it automatically succeeded to the trusteeship of Otto Young's trust, without securing an appointment by a Court of competent jurisdiction as required by the testator's will.

The questions which immediately present themselves under these circumstances are: Is it a violation of the due process clause of the Fourteenth Amendment for a State, through its legislature or its courts, to charge a testator with knowledge of the contents of statutes which, at the time of his death, were yet unconceived and might never be, especially where, at the time of execution of his will and at the time of his death, any provisions of his will which provided for succession to the trusteeship of his estate conformably to the provisions of the subsequently enacted statutes would have been illegal under the law of the State? If the Federal court enforces a supposed State rule of decision to such effect, does it thereby violate the Fifth Amendment?

Petitioners contend that the Illinois rule of decision in this regard is not as the Court of Appeals determined it to be. As would seem to be compelled by man's innate inability to peer into the future, the Illinois courts have never attributed powers of prophetic vision to a testator or to any one who conveys property irrevocably. The cardinal rule of will construction in Illinois being that the actual intent of a testator must govern unless contrary to public policy (*Boyd* v. *Strahan,* 36 Ill. 355, 359; *Orr* v. *Yates,* 209 Ill. 222, 299), it is not surprising to find that Illinois courts have departed from this salutary rule only to the extent of charging the testator with knowledge as to the contents of statutes which were **in actual existence at the time of his death.** *Smith* v. *Garber,* 286 Ill. 67, 71; *Carpenter* v.

*Browning,* 98 Ill. 282, 285; *Belfield* v. *Findlay,* 389 Ill. 526, 529.

The case of *Chicago Title & Trust Co.* v. *Zinser,* 264 Ill. 31, from which the Court of Appeals apparently derived its erroneous view, clearly does not stand for the proposition that a testator is charged with knowledge of statutes enacted long after his death. When the Illinois Supreme Court in that case (264 Ill., at pp. 35-36) stated that "Etta Nelson, in naming the Real Estate Title and Trust Company as executor and trustee, knew that . . . the statute authorized . . . the consolidation of the corporation with any other corporation then existing or that might thereafter be organized" and "therefore contemplated that . . . the Real Estate Title and Trust Company might be consolidated with some other corporation such as the Chicago Title and Trust Company . . .," the Court was referring to and construing a statute *existing when the will was made, as well as at the time of her death.* General Corporation Laws, Hurd's Ill. Rev. Stat. (1913 ed.) ch. 32, Sec. 50 and 56.

In relying upon the *Zinser* case to achieve the result expressed in its opinion in the instant case, it is manifest that the Court of Appeals grossly over-extended the authoritative value of the *Zinser* case, in disregard of the express limitation which the Illinois court itself imposed upon its own decision. In its opinion in the *Zinser* case the Illinois court said (264 Ill., at pp. 34-35):

> "*. . . what is here said is not to be understood as intimating any opinion concerning the effect of the purchase by one corporation of the property, stock and franchises of another, or the merger of one corporation into another or the absorption by one of the other, upon the question . . . whether a purchase, merger or absorption carries with it the right to act as executor or trustee.*" (Emphasis supplied.)

The reason for this self-imposed limitation is obvious. The holding in the *Zinser* case turned entirely upon the

language of, and meaning to be assigned to, *particular provisions* of the General Corporation laws in *existence* at the time the testatrix executed her will and at the time of her death. If the *Zinser* case, were intended to lay down a general rule of automatic succession to fiduciaryships under any type of unification, and without regard to the language of, and the meaning to be assigned to, the particular statute there involved, as it was interpreted by the Court of Appeals, there can be no rationalization of the restrictions explicitly imposed by the Illinois court upon the authoritative scope of its own decision. From this analysis, it may be seen that to regard the *Zinser* case as announcing a State rule of decision as to the consequences of a merger —particularly one which took place in the banking field, entirely outside the scope of the General Corporation laws there being considered, and which was entered into under the claimed authority of a statute not only created by another sovereign but also enacted many years after the testator's death—is to impose upon the *Zinser* case a meaning foreign to the circumstances under which it arose and in contradiction and defiance of its very words. Thus, petitioners contend that the Court of Appeals failed to follow Illinois law.

Petitioners contend, further, that even if the Illinois rule of decision were as held by the Court of Appeals, that court violated the Fifth Amendment by applying such a rule, since it is obvious that such rule would violate the due process clause of the Fourteenth Amendment. As seen from the case of *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 643-644, it is a violation of due process for a State to create unreasonable and arbitrary presumptions. It is submitted that nothing could be more unreasonable or arbitrary than to presume that the testator intended to do that which became lawfully possible for the first time many years after his death, under subsequently enacted statutes

of another sovereign, particularly where to so provide at the time of his death would have been illegal and contrary to the public policy of Illinois, as shown by the case of *People* v. *Brady*, 271 Ill. 100, 111.

**(5)**

**Conclusion.**

Should certiorari be granted here, petitioners will show, also, that the Court of Appeals misconstrued and failed to give proper effect to those portions of Otto Young's will specifying the circumstances under which, and providing the mechanics by which, a successor trustee was to be appointed, with the result that the Court of Appeals erroneously reversed that part of the District Court's decree holding the First Union Trust and Savings Bank, from 1929 to 1933, and respondent Bank, from 1933 to date, acted as successor trustee without authority under the will, and should account for that period as *de son tort* trustees.

Respectfully submitted,

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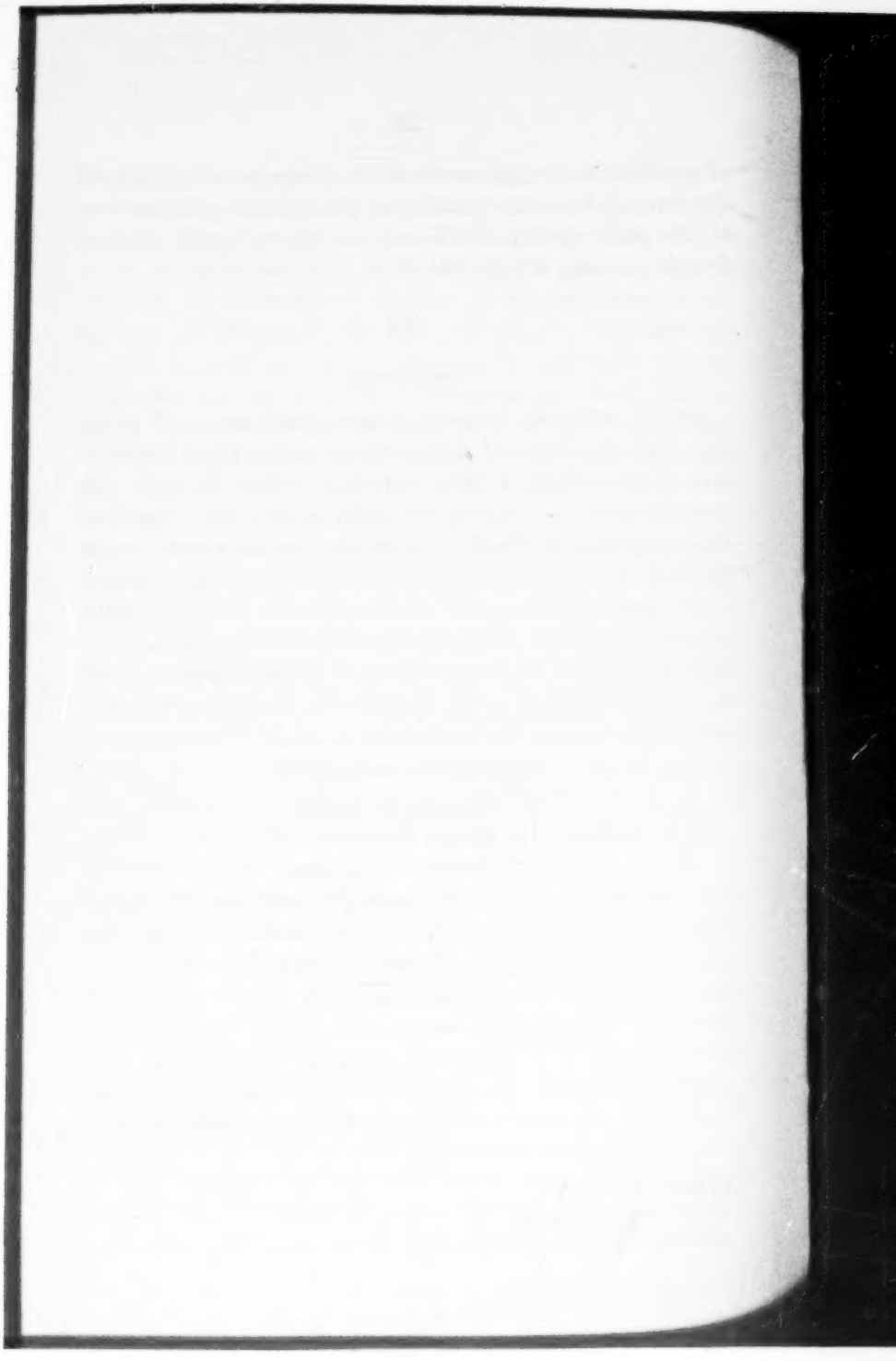

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## APPENDIX.

### "A".

**(District Court opinion pertaining to succession by consolidation. DeKorwin v. First Nat. Bank of Chicago, 84 F. Supp. 918, 934-937.)**

*The Succession in Trust.*

Determination of plaintiff's second claim, that a successor trustee must be appointed by this court and that the First National Bank is accountable here as a trustee *de son tort,* necessarily turns upon a construction of the following provisions in the will (Secs. Fourth and Sixth):

> "I give, devise and bequeath all the rest, residue and remainder of my estate, of every kind and nature, to the first Trust and Savings Bank of Chicago, a corporation organized under the laws of the State of Illinois * * * as trustee * * * In the event that said trustee shall refuse to qualify or act, or further act, as trustee under this will, for any cause, a successor in trust, or a new trustee, may be appointed by any court of competent jurisdiction by and with the approval in writing of the appointee by not less than one-half (½) in number of my wife and children then living and such new trustee so appointed shall have all the powers given to the original trustee named herein."

Plaintiff states that "the testator's intention appears to be that upon any termination of the corporate existence of the First Trust and Savings Bank of Chicago, an Illinois corporation, through unification with another corporation by consolidation, merger, sale, or otherwise, there shall be a vacancy in the trust and that appointment of a successor trustee may be had only through resort to a court of equity in the manner provided for by the terms of his will." Under this construction it is urged that the First National Bank of Chicago has been administering Otto Young's trust estate without authority or right, and that the First Union Trust and Savings Bank before it was lacking in legal authorization to act. Plaintiff contends that a suc-

cessor trustee must be appointed to preserve the trust and that the unauthorized or constructive fiduciaries should be held accountable as trustees *de son tort*.

The First National Bank seeks to justify its action in taking over the trust on the ground there has never been a vacancy in the trust as a matter of law and because it was "the testator's intention that the trustee under the trust created by his will should be the trust organization constituting a part of or being directly affiliated with the First National Bank of Chicago." Its position in the latter respect is based largely on "the relationship between the testator and the First National Bank of Chicago and First Trust and Savings Bank."

It is difficult to perceive how the testator could have provided more plainly for the mode of appointing a successor trustee in the event his designated trustee ceased to act for any reason. He stated in unmistakable terms that any successor or new trustee must be appointed by a court of competent jurisdiction. The law appears firmly settled in Illinois that where a testator specifies in what manner a successor trustee is to be appointed, such a fiduciary can succeed to the trust in no other way. In *French v. Northern Trust Co.*, 197 Ill. 30, the Illinois Supreme Court stated the law on this subject to be (p. 38): "The author of a trust has the right to say in what manner vacancies shall be filled, and if he exercises that right they cannot be filled in any other way, unless there is a failure or refusal to fill them as directed or the trustee fails or refuses to act, in which case chancery will interpose to preserve the trust." To the same effect, see *In re Estate of Beckwith*, 258 Ill. App. 411, and cases there cited.

It may not be seriously claimed that Otto Young's original trustee is still acting, since it is undisputed that the corporate life of the First Trust and Savings Bank has long since been extinguished. Of necessity, therefore, the First National Bank in administering the trust is either a successor trustee or a new trustee. The same was true before it of the First Union Trust and Savings Bank. In either case, by the terms of the will, the successor bank could be acting properly only by the decree of a court of equity. It is admitted that no such judicial sanction was ever obtained, either for the First National Bank to act,

or in any way approving the trust administration by its predecessor, the First Union Trust and Savings Bank. The original trustee having ceased to act by reason of its legal death, and a successor or new trustee having never been lawfully appointed, the only conclusion reachable is that the trust is vacant. The McFadden Act does not apply to such a situation (*Ex Parte Worcester National Bank,* 279 U. S. 347).

Much has been said by both sides as to the status of the First National Bank had such provision as to appointment of a successor trustee not existed in the will of Otto Young. Whether, in the absence of such provision, the First National Bank would now be a duly constituted trustee is not before this court. The Bank relies heavily upon *Chicago Title & Trust Co.* v. *Zinser,* 264 Ill. 31, where the Court held the title company's position as executor could not be challenged in a suit by it for specific performance. After the testatrix executed her will naming another corporation as executor, the latter consolidated with the title company during her lifetime. Also, the title company had received its appointment under the will from the Probate Court. This circumstance, coupled with the fact that the consolidation occurred in the testatrix' lifetime under the then existing laws of the State, would make the Zinser decision inapplicable as an authority upon the effect of the consolidation of a State bank with a national bank in the instant case, quite apart from the special provision in the decedent's will. It should not be lost sight of that national banks were unable to act as testamentary fiduciaries until seven years after Otto Young's death, and that State banks could not consolidate with national banks until more than twenty years thereafter. *First National Bank* v. *Lindberg,* 293 Ill. App. 474, sheds no light upon the consolidation problem, even in the absence of such a provision in the will, because the case deals only with the inactive trusteeship of a trustee under a mortgage deed of trust. There the mortgagor was attacking the status of the plaintiff in foreclosure to escape his just obligation to bondholders and free his property from the lien of the mortgage.

The case now before this court requires it to determine the effect of the specific provisions quoted from the will of the decedent, and even if it be assumed that in its absence the First National Bank would have acquired a law-

ful status as trustee, it is impossible to reach that conclusion upon this record. That the named trustee ceased to exist and, therefore, could not act as trustee, is established beyond controversy, for the Zinser case upon which the Bank most relies holds, as do others, that bank consolidations destroy the constituent corporations. Thus the condition specified in the decedent's will occurred as early as 1929. Appointment of "a successor in trust" became necessary, and the mode of selection was specified by the testator to be through "any court of competent jurisdiction." This procedure has evidently not been resorted to by any beneficiary of the estate, either alone or in conjunction with others. It is impossible to conclude that "a successor in trust" under Otto Young's will could acquire a lawful status except through chancery appointment, for it is clear that the will contemplates this procedure in the events which have happened.

The Bank seeks to escape this conclusion by attempting to show through extrinsic circumstances that the First National Bank fell within the testator's intent in executing the successor trusteeship and, therefore, properly acts without judicial appointment. How Otto Young could have envisioned what was legally impossible of attainment until many years after his death is not explained, and no such purpose is intimated in his will. No amount of extrinsic evidence could have the effect of transforming a designation of the First Trust and Savings Bank into an appointment of the First National Bank. They were separate legal entities and existed and functioned as such. Each owed its origin to a different sovereignty and each was amenable to different laws. This court is compelled to hold that the First National Bank is acting without authority and as such is a trustee *de son tort*, and it is accountable as such during its administration of the trust and for its predecessor in like capacity from the date of the consolidation of the First Trust and Savings Bank with the Union Trust Company after which it became the First Union Trust and Savings Bank.

The First National Bank asserts further that the testator's language should be construed to mean that he did not specifically appoint as his trustee "the First Trust and Savings Bank of Chicago, a corporation organized under the laws of the State of Illinois," and that this court should

declare by way of judicial construction that it was "the testator's intention that the trustee under the trust created by his will should be the trust organization constituting a part of or being directly affiliated with the First National Bank of Chicago." On its face a ruling of this character would require the deletion of language showing clear testamentary intent and the substitution for such expunged provision of an entirely different direction nowhere indicated by the testator within his will. Such action by the court could not constitute a construction of the testamentary instrument but would amount to redrafting the will, a course the courts are strictly forbidden to follow. (*Gridley* v. *Gridley*, 399 Ill. 215, 229.) The Bank claims that its construction should be adopted "especially" because of "the relationship between the testator and the First National Bank of Chicago and First Trust and Savings Bank." Apparently that relationship was quite close, the testator having been a stockholder and director of both banks. If such a circumstance were properly to be considered in construing the testator's language, his intimate knowledge of the First National's affairs as stockholder and director might just as well be viewed in connection with the fact of his failure to mention such bank as indicative that he did not desire it to act as his trustee. In this connection there is force in the suggestion that under the Bank's construction a trustee has never been validly appointed since designation of a national bank at the time of the will would have been unlawful, but as this inquiry would require going behind the Circuit Court decree of 1922 it will not be further noticed.

Even in the light now cast by the First National Bank, the relationship between Otto Young and the two banks cannot help it (*Ickes* v. *Ickes*, 386 Ill. 19; *Cahill* v. *Michaels*, 391 Ill. 395; *Knight* v. *Knight*, 367 Ill. 646). In the *Ickes case* the Court said (p. 29): "Extrinsic evidence is never admissible for the purpose of varying the intent of the testator as expressed in the will." And in the *Knight case* the Court pointed out (p. 648) that if "the wording of the will is plain * * * the court can not change the language *even if the testator intended something different from what he said.*" However, assuming it was testator's wish that the First National Bank's trust organization or affiliate act as his trustee but that such a provision was omitted from the will merely

because he overlooked it, or that he had such a provision in his mind but simply neglected to express it, or that he would have so provided if he had only thought of it, the controlling decisions are uniform to the effect such speculation may not be indulged in upon construction by the court. In *Hull* v. *Adams,* 399 Ill. 347, the Illinois Court said (p. 352): "The question for the court to determine in every will construction case is not what the testator meant to say, but what he meant by what he did say." In *Glaser* v. *Chicago Title & Trust Co.,* 393 Ill. 447, the Court said (p. 463): "The Court cannot speculate or guess as to what provision he would have made had he not overlooked it." In *Gridley* v. *Gridley,* 399 Ill. 215, the Court said (p. 229): "When a condition has arisen in regard to a testator's estate which he had not taken into consideration and which he would probably have provided for if he had thought of it when making his will, the court cannot conjecture what provision he would have made unless that provision is contained in the words he has used in making his will. (*First Trust and Savings Bank* v. *Olson,* 353 Ill. 206.) The intention of the testator is not to be deduced from speculation as to what he would have done had he anticipated a change in the circumstances surrounding him at the time of the execution of the will, *since this would amount to making a will for him and not to interpreting the will he has made.*"

## "B".

**(Court of Appeals opinion pertaining to succession by consolidation. DeKorwin v. First Nat. Bank of Chicago, 179 F. 2d 347, 350-354.)**

We have remaining for determination the question of the propriety of the District Court's judgment to the effect that the trusteeship created by Otto Young's will is vacant and that defendant National Bank and its predecessors should account *de son tort.*

Otto Young died November 30, 1906, testate, his will having been executed in 1905. Therein he named the First Trust and Savings Bank of Chicago as trustee of his residuary estate. This banking institution and been organized and was then being conducted in behalf of the stockholders and directors of the First National Bank. Young was one of its directors. The purpose of its organization was to provide the First National with a trust department, inasmuch as at that time the power of a national bank to administer trusts was questioned. Despite the fact that it was a separate corporate entity organized under the laws of Illinois, the First Trust & Savings was under the same ownership, control and management as the First National. Promptly upon Young's death, the First Trust entered upon the execution of its powers and duties as trustee under his will and continued so to do until February 11, 1929, when, in accord with Section 12 of the Illinois Banking Act, it consolidated with the Union Trust Company, another Illinois corporation endowed with statutory power to administer trusts. The consolidated corporation, First Union Trust and Savings Bank, continued to administer the trust. It, too, was owned, controlled and managed by the same persons who owned, controlled and managed the First National. On July 17, 1933, pursuant to the authority granted by the McFadden Act, 44 Stat. 1224-1226 as amended, 48 Stat. 190, the First Union was consolidated with the First National and thence afterward the consolidated bank, the present defendant, the First National, continued to perform the duties of the trustee imposed by the will of Otto Young exactly as had been done by the predecessor corporations.

Under this state of facts, plaintiff contended and the trial court found that when the First Trust was consolidated with the Union Trust Company, the office of trustee, under the terms of the will, thereby automatically became vacant and that the successor, from that time on, acted as trustee *de son tort.*

No one questions the validity of either of the consolidations or that all assets belonging to the trust estate did in fact pass in each instance to the successor consolidated corporation. It is undisputed also that the consolidation of July 17, 1933, under the McFadden Act, whereby the assets of the First Union Trust and Savings passed to the First National, was approved both by the Auditor of Public Accounts of the State of Illinois and the Comptroller of the Currency of the United States.

The pertinent clause in the will is as follows: "In the event that said trustee shall refuse to qualify or act, or further act, as trustee under this will, for any cause, a successor in trust, or a new trustee, may be appointed by any court of competent jurisdiction • • •." It is plaintiff's theory that at the time of the merger in 1929, the original trustee, thereby, as a matter of law, refused "to act" or to "further act" and that, therefore, under the terms of the will, no new authorized trustee could come into existence except by appointment by a court of competent jurisdiction. In other words, plaintiff can not complain, if the contingency mentioned in the will never occurred. That issue, in turn, becomes entirely one of whether, under the pertinent laws, the consolidations mentioned produced a contingency contemplated by the testator in his will, upon the happening of which the office of trustee became vacant. Stated otherwise, a court of equity is without power to appoint a trustee to fill a vacancy under this will if a vacancy never existed.

In an early Illinois decision, *Robertson* v. *City of Rockford,* 21 Ill. 451 (1859), the city had authority to lend money to a certain railroad but before the loan had been effectuated the railroad entered into a consolidation. The court held the suit of taxpayers to enjoin the proposed loan to the consolidated corporation to be without merit, saying: "When the legislature by the same act which conferred the power on the city to lend its credit to each of these com-

panies, also empowered them to consolidate their roads, it must have been intended that the power of the city might be exercised after such consolidation, as effectually as before that event occurred." The same thought persists throughout subsequent Illinois decisions and in the public policy reflected by various acts of the legislature governing corporations and banking and trust companies. Thus, the present Banking Act, enacted in 1887, Illinois Revised Stats. (1947), Chap. 16½, Sec. 12, is "Such change of name, place of business, increase or decrease of capital stock, increase or decrease of number of directors, managers or trustees, or consolidation of one corporation with another, shall not affect suits pending in which such corporation or corporations shall be parties; nor shall such changes affect causes of action, nor the rights of persons in any particular; nor shall suits brought against such corporation by its former name be abated for that cause."

A decision typical of the Illinois courts' reasoning in interpreting this statute is *Albers* v. *McNichols,* 301 Ill. App. 551. There, a nonassignable guaranty in favor of one of the constituent banks was held to pass automatically upon consolidation to the consolidated bank, the court saying: "The scheme is that the corporation which is merged with another should lose its identity *only so far as its separate existence is concerned* and that *it should be swallowed up in the other, and become* an *integral part thereof, carrying into the corporation* which survives all its rights, powers and assets. * * * The resulting bank is possessed of all the interests of the former banks * * *." (Emphasis supplied.) see also *Scheidel Coil Co.* v. *Rose,* 242 Ill. 484, and *Chicago Title & Trust Co.* v. *Doyle,* 259 Ill. 489. In the first of the two cases last cited the court said: "A new corporation comes into existence having all the property, rights, powers and franchises, and subject to all the duties and obligations of both the constitutent companies."

The essential, indeed, the decisive thought reflected by legislation and decisions of Illinois is that, though the separate legal existence of a merging corporation may terminate its corporate powers pass to the consolidated corporation, and its functions are continued in the new corporation of which it is a constituent component part. It is not surprising, therefore, to find the Supreme Court saying, in

*Chicago Title & Trust Company* v. *Zinser*, 264 Ill. 31, that where a corporate trustee named in a will is merged with another corporation, the consolidated corporation receives and retains all the property and functions of each of the original corporations which have become integral parts of the new corporation. There Etta Nelson had appointed the Real Estate Title and Trust Company executor of her will and, before her death, that company had been consolidated with the Chicago Title and Trust Company. Pursuant to and in accord with the provisions of the corporation statute of Illinois, which are to all intents and purposes, the same as those of the Banking Act, the consolidated corporation, as executor, sought to procure a decree of specific performance upon a contract belonging to the original executor. Defendant contended that the Chicago Title & Trust Company had no power or authority to act as the testamentary trustee. The court disposed of the contention by saying first: "By the consolidation of the Real Estate Title and Trust Company and the Chicago Title and Trust Company, the original corporations ceased to exist and the appellee, as the consolidated corporation, acquired and succeeded to all the faculties, property, rights and franchises of its component parts and became subject to all the duties, obligations and conditions imposed upon them. (*Robertson* v. *City of Rockford*, 21 Ill. 451; *Chicago, Rock Island Pac. RR Co.* v. *Moffitt*, 75 id. 524)." Then, after referring to the rule that a trustee may not delegate his authority, the court continued: "The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality, and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title and Trust Company as executor and trustee, knew that its directors, officers and stockholders might change from time to time, and that the statute authorized * * * consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur and that the Real Estate Title and Trust Company might be consolidated with some other corporation such as the Chicago Title and Trust Company,

and that it would thereby cease to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises. The appellee was entitled to execute the trust, and the chancellor did not err in overruling the demurrer."

The underlying reason for this decision, obviously, is that every testator is presumed to know that changes in the structure of a corporate trustee may occur and to have contemplated the possibility of consolidation, change of name or other mechanical improvement or modification of the corporate structure. That a testator is bound by such presumption is in accord with the general doctrine that every citizen contracts and conveys property with the knowledge in mind that the government of the sovereignty under which he lives may, within its constitutional limits, authorize changes in the public policy, whether it be determination of the gold content of the dollar or of other matters growing out of the police power of the state or the constitutional power of the United States, in their respective fields. So, when Otto Young executed his will, he knew that the statute of Illinois had authorized consolidation of corporations authorized to administer trusts. Therefore, he contemplated that such consolidation might occur under that statute for, under the law, he was bound so to contemplate. When the original trust company merged with the second company in 1929, each of the merging companies became an integral part of the new corporation which succeeded to all the rights of and became bound to discharge all obligations imposed upon each of the integral component parts.

It is said that the *Zinser* case is distinguishable from this case. We think it can not be distinguished in underlying principle. True, there the consolidation took place before the decedent died, but, if the consolidated corporation was not a legal continuing existence of the corporate trustee actually named in the will, if it did not stand in its shoes, then the probate court had no authority to designate it as executor, for, under the statutes, that court may name as executor only the person nominated by the testator. If the testator has designated no executor or the one named

refuses or fails to act, the probate court can only appoint an administrator with the will annexed. Consequently, the act of the probate court, in designating the successor corporation as trustee, was a recognition of the continued existence of the merging corporation, so far as functions and obligations were concerned, in the new corporation as a part thereof. The provisions of the will in the *Zinser* case are not precisely the same as those in the present case, so far as naming a trustee is concerned, but the differences are not such as to distinguish the two cases in principle.

The significant thought, as we gather it from the Illinois authorities, is that, upon consolidation of banking corporations and trust companies, the merging corporations, though they cease to exist as individual entities, are merged into and become integral parts of the new corporation and that, though they therefore lack formal legal existence, for the purpose of performance of their trust duties and obligations, they remain alive, by permission of the legislative body, in a new corporate entity. In this we are corroborated by then Attorney General Kerner of the State of Illinois, in Illinois Attorney General Reports and Opinions 1934 p. 380. It follows that, inasmuch as the testator was presumed to know that consolidation might occur, he necessarily contemplated that it would occur and that, when consolidation did occur, he intended what the laws says, namely, that the functions of the merging corporations would pass to the new corporation. Therefore the contingency upon the happening of which the right of a chancellor to appoint a trustee has never occurred.

Thus far we have dealt only with the effect of the merger of 1929. We pass to the consolidation of the First Union with the First National in 1933, when, pursuant to the McFadden Act, Title 12, Section 34 (a) U.S.C.A., the former merged with the First National. This statute provides that any banking corporation under the laws of any state may be consolidated with national banking organizations located in the same city and that "* * * the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association *shall be deemed to be the same corporation as each of the con-*

*stituent institutions.*" The statute provides further that "* * * such consolidated national banking association, by virtue of such consolidation and *without any order or other action on the part of any court or otherwise, shall hold and enjoy the same,* all rights of property, franchises, and interests, including appointments, designations, and nominations and all other *rights and interests as trustee,* executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estate of lunatics and in every other fiduciary capacity, *in the same manner* and to the *same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation.*" (Emphasis supplied.)

The only restriction is that the act shall not apply if the consolidation would contravene the laws of the state where the banks are located. Our attention has been directed to no laws of the state of Illinois of which it can be said that such a consolidation contravenes them. Indeed, Illinois had recognized the validity of consolidation of state and national banks prior to enactment of the McFadden Act. Thus, in *McRoberts* v. *Minier,* 270 Ill. App. 1, the court said: "The Banking Act of this State, Cahill's St. ch. 16a, grants to State banks the right to consolidate with each other and also with a national bank upon complying with certain conditions." And in *First National Bank* v. *Lindberg,* 293 Ill. App. 474 at 481, the court announced: "It does not appear from anything called to our attention that it was necessary to specifically authorize the consolidation of a State bank with a national bank to give effect to the powers and authorities conferred by the national act. Therefore, in the absence of a State statute prohibiting such consolidation, the national act applies and is the basis of the authority for the consolidation." The Attorney General of Illinois, in his opinions in 1927, said: "* * * by such consolidation the constituent corporations by operation of law cease to exist and the new corporation accedes to all the rights, property franchise and interest, including the right of succession as trustee, executor or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by the constituent banks." We conclude that there is no statute in Illinois which in any wise contravenes such consolidation.

The language of the Act is clear and explicit. Under it the right of the merging bank to act as trustee and its obligations as trustee, are continued in the new corporation "to the same extent and in the same manner" "as they were held and enjoyed by any constituent institution at the time of such consolidation." Thus, when Otto Young made his will, he was charged with the knowledge not only that a consolidation might occur in Illinois under Illinois law but also that it might occur likewise by virtue of a federal statute thereafter enacted. Having been charged with such notice, he is presumed to have contemplated that, in case of any such consolidation, the duties of the trustee under his will would inevitably pass, as functions of an integral part of the new corporation, to the consolidated corporation and continue in existence in it. We conclude that the court erred in finding that the First National is not the duly authorized qualified trustee under the will of Otto Young, within the testator's intention and contemplation.

That portion of the judgment declaring the trusteeship vacant, ordering the First National Bank and its predecessors to account as trustees *de son tort* and appointing "special trustees *pendente lite*" is reversed with directions to proceed in conformity with the views expressed in this opinion. In all other respects the judgment is affirmed. The costs of this appeal shall be taxed one-half to appellants and one-half to appellees.

## "C".

**(Pertinent provisions of the McFadden Act of 1927, as amended in 1933. Act of Feb. 25, 1927, 44 Stat. 1224-1226, as amended by Act of June 16, 1933, 48 Stat. 190-191, U. S. C., T. 12, Sec. 34a.)**

Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same state, county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such state bank if the laws of the state where the same is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper of general circulation published in the place where the said association or bank is situated, and in the legal newspaper for the publication of legal notices or advertisements, if any such paper has been designated by the rules of a court in the county where such association or bank is situated, and if no newspaper is published in the place, then in a paper of general circulation published nearest thereto, unless such notice of meeting is waived in writing by all stockholders of any such association or bank, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting, but any additional notice shall be given to the shareholders of such state bank which may be required by the laws of the state where the same is organized. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located. Upon such a consolidation, or upon a con-

solidation of two or more national banking associations under section 1 of this Act (12:33), the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, exeeutor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation: Provided, however, That where any such constituent institution at the time of such consolidation was acting under appointment of any court as trustee, executor, administrator, registrar of stock and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or in any other fiduciary capacity, the consolidated national banking association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such constituent corporation prior to the consolidation, and nothing herein contained shall be construed to impair in any manner the right of any court to remove such a consolidated national banking association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any such consolidated association be removed solely because of the fact that it is a national banking association. When such consolidation shall have been

effected and approved by the Comptroller any shareholder of either the association or of the State or district bank so consolidated, who has not voted for such consolidation, may give notice to the directors of the consolidated association within twenty days from the date of the certificate of approval of the Comptroller that he dissents from the plan of consolidation as adopted and approved, whereupon he shall be entitled to receive the value of the shares so held by him, to be ascertained by a committee of three persons, one to be selected by the shareholder, one by the directors of the consolidated association, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to such shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and the consolidated association shall pay the expenses of reappraisal, and the value as ascertained by such appraisal or reappraisal shall be deemed to be a debt due and shall be forthwith paid to said shareholder by said consolidated association, and the shares so paid for shall be surrendered and, after due notice, sold at public auction within thirty days after the final appraisement provided for in this Act (section); and if the shares so sold at public auction shall be sold at a price greater than the final appraised value, the excess in such sale price shall be paid to the said shareholder; and the consolidated association shall have the right to purchase such shares at public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price as its board of directors by resolution may determine. The liquidation of such shares of stock in any state bank shall be determined in the manner prescribed by law of the state in such cases if such provision is made in the state law; otherwise as hereinbefore provided. No such consolidation shall be in contravention of the law of the state under which such bank is incorporated.

The words "state bank", "state banks", "bank", or "banks" as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of state laws.

## "D".

**(Pertinent Provisions of the Illinois Banking Act, "An Act To Revise The Law With Relation To Banks And Banking", Approved June 23, 1919, L. 1919, p. 224, Ratified By Vote Of The People November 2, 1920, As Amended By Act Approved June 4, 1929, L. 1929, p. 174, Ratified At State-Wide Referendum November 4, 1930, Smith Hurd Ill. Rev. Stat., 1933, Chap. 16½.)**

**2. Application—Permit.**] § 2. When any association of persons, as hereinafter set forth, desire to avail themselves of the provisions of this Act, they shall apply to the Auditor of Public Accounts for permission to organize, stating their place of business, giving street address, town and county of the same, the amount of capital and surplus, the amount for which each share in the proposed organization is to be sold, and name under which they desire to organize and the time for which such association shall continue, which statement shall be under their hands and seals and acknowledged before some officer authorized by law to acknowledge deeds.

The application shall be signed by at least the number of persons specified and if the banking institution is to be located within a city, village or incorporated town, they shall all be residents of such municipality, as follows:

If not within any such municipality, or, if within such a municipality of 10,000 inhabitants or less, five persons;

If within such a municipality of more than 10,000 inhabitants and not more than 25,000 inhabitants, ten persons;

If within such a municipality of more than 25,000 inhabitants, and not more than 50,000 inhabitants, fifteen persons;

If within such a municipality of more than 50,000 inhabitants and not more than 100,000 inhabitants, twenty persons;

If within such a municipality of over 100,000, twenty-five persons, twenty of whom reside within three miles of proposed location of the banking institution.

Accompanying this application must be a statement made before some officer authorized by law to acknowledge deeds,

giving the net financial worth of each of the members of this association of persons and these financial statements shall be accompanied by at least three references as to personal character of each individual named therein. The Auditor shall examine said application and accompanying statement and shall investigate the truth of the statements contained therein and if it appears that the statements therein and the affidavits in connection therewith are true, and that the applicants are entitled to a permit to organize the Auditor shall issue to them a permit to organize, but no permit shall be issued hereunder to any corporation by the same name as any other corporation then operating under the laws of this State or of any law of the United States, or by a name so similar to the name of any other corporation then operating under the laws of this State, or of any law of the United States as in the opinion of the Auditor of Public Accounts will create confusion, and all associations formed under this Act shall have their capital stock divided into shares of not less than ten dollars ($10.00) each nor more than one hundred dollars ($100) each. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

**3. Capital stock subscription—Election of directors.**] § 3. As soon as may be after receipt of authorization, books of subscription to the capital stock may be opened, and when the capital stock shall have been fully subscribed for, a meeting of the subscribers to the stock of such association shall be called (each subscriber having had at least three days' notice) for determination of the number and election of directors to serve as managers for one year, and until their successors are elected. And no director shall be elected unless he shall have received votes representing at least a majority of the shares of the association; and the voting may be done by person, or by proxy, and at such election the subscribers or stockholders shall have the right to vote for the number of shares owned or subscribed by him for as many persons as there are directors to be elected, or to accumulate such shares and give one candidate as many votes as the number of directors multipled by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall deem proper.

**4. Directors—Organization—False statements.**] § 4. The directors so elected may proceed to organize by the election of one of their number as president, and may appoint such other officers as the by-laws may provide, and fix their salaries, to carry on the business of the bank or association and make by-laws (not inconsistent with this Act) for the government of the bank or association, and may employ necessary employees; and each director shall take and subscribe to an oath such as the Auditor shall prescribe of fealty to the bank or association of which he is director and that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such bank or association and will not knowingly violate or willingly permit to be violated any of the provisions of this Act; and that he is the owner in good faith and in his own right of the number of shares of stock required by this Act; and that the same is not hypothecated or in any way pledged as security for any loan or debt. Such oath subscribed by the director making it and certified by a proper officer authorized to administer oaths shall be immediately transmitted to the Auditor and shall be filed and preserved by him in his office. The directors shall cause to be kept suitable books of record of all the transactions of the bank or association and shall furnish to the Auditor lists of the stockholders and copies of any other records the Auditor may require. And there shall be an annual meeting of the stockholders for the election of directors each year on the first Monday in January unless some other date shall be fixed by the by-laws of the association. Any omission to elect directors shall not impair any of the rights and privileges of the association or of any person in any way interested but the existing directors shall hold office until their successors are elected and qualified as in such cases may be by law provided.

Every director of any bank or association organized under the provisions of this Act must own in his own right, free of any lien or encumbrance, shares of the capital stock of the bank or association of which he is a director, the aggregate par value of which shall not be less than one thousand dollars ($1,000), and stock certificates evidencing the capital stock of such bank or association of which he is a director, the aggregate par value of which shall not be less

than one thousand dollars ($1,000) issued in his name, shall be filed unendorsed and unassigned by him with the cashier of such bank or association during his term as director. Any director who ceases to be the owner of capital stock of such bank or association of the aggregate par value of one thousand dollars ($1,000), or becomes in any form disqualified, shall vacate his place as such director. The directors of any bank or association organized under the provisions of this Act, shall hold regular meetings at least once each month. A special meeting of the directors may be held as provided by the by-laws A special meeting of the directors may also be held upon call by the Auditor of Public Accounts or a bank examiner appointed under the provisions of this Act, upon twelve hours notice of such meeting by personal service of such notice, or by mailing said notice to each of the directors at his residence as shown by the books of the bank. There shall be present at each meeting a quorum, which shall consist of a majority of the directors.

Any officer, director or employee of any bank or association organized under the provisions of this Act, who shall wilfully and knowingly subscribe to or make or cause to be made any false statement with intent to deceive any person or persons authorized to examine into the affairs of such bank or association, upon conviction thereof, shall be punished by imprisonment of not less than one year or more than ten years in the penitentiary. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

**5. Issuance, recording of certificate to commence business.**] § 5. When the directors have organized, as provided in Section 4 of this Act, and the capital stock of such association shall have been all fully paid in and record of the same laid before the Auditor, together with an affidavit signed by each subscriber to the capital stock of such association stating that he is the owner of property in his own right, not including any stock of such association, in excess of all indebtedness of market value at least equal to the par amount fo stock subscribed for by him, and in the event any such person shall make a fraudulent affidavit he shall be guilty of perjury, the Auditor shall by himself or some competent person of his appointment, make a thorough

examination into the affairs of such association, and if satisfied the authorized capital has been paid in, and that the association has the full amount dedicated to the business, including a surplus which shall be not less than ten (10) per cent of the capital, and a reserve for operating expenses of at least five (5) per cent of the capital and when they pay into the Auditor's office the reasonable expenses of such examination, as determined by the Auditor, he shall give them a written or printed certificate under seal authorizing them to commence the business designated in Section 1 of this Act. And said certificate and the permit issued in accordance herewith, duly certified by said Auditor, shall be filed and recorded in the office for the recording of deeds in the county where such bank is organized, and the original or certified copy thereof shall be evidence in all courts of the existence and authority of said corporation to do business. Upon the recording of said certificate and permit said bank shall be deemed fully organized and may proceed to business.

The Auditor may, in his discretion, withhold the issuing of the said certificate, authorizing the commencement of business when he is not satisfied as to the personal character and standing of any officer or any director elected or appointed, in accordance with Sections 3 and 4 of this Act, or as to the truth of any statement contained in the affidavit of any subscriber, or when he has reason to believe that the bank is organized for any purpose other than contemplated by this Act, or that a commission or fee has been paid in connection with the sale of the stock of the bank. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

**8. Examination by Auditor.**] § 8. The Auditor, as often as he shall deem necessary or proper, and at least once in each year, shall appoint a suitable person or persons to make an examination of the affairs of every bank established under the provisions of this Act, which person shall not a stockholder or officer or employee of any bank which he may be directed to examine, and who shall have power to make a thorough examination into all the affairs of the bank, and in so doing to examine any of the officers or agents or employees thereof on oath, and shall make a full and detailed report of the condition of the bank to the

Auditor; and the bank shall not be subject to any other visitorial power than such as may be authorized by this Act, except such as are vested in the several courts of law and chancery. And there shall be paid to the Auditor of Public Accounts for each such examination, a fee of forty dollars ($40) and three cents (3c) additional for each one thousand $(1,000) of the total assets of the bank examined.

No bank or banking association organized under this Act, and no officer, director or employee thereof shall hereafter make any loan or grant any gratuity to any bank examiner appointed under the provisions of this Act. Any bank officer, director or employee violating this provision shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not more than five thousand dollars ($5,000) or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

**12. Proceedings relating to change of name, business, etc.**] § 12. Whenever the board of directors, managers or trustees of any corporation having any banking powers existing by virtue of any general or special law of this State, or any corporation with banking powers hereafter organized under the provisions of this Act, may desire to change the name, to change the place of business, to increase or decrease or change the par value of the capital stock, to extend the duration of its charter, to increase or decrease the number of directors, managers or trustees, or to consolidate such corporation with any other corporation having banking powers which may hereafter exist, they may call a special meeting of the stockholders of such corporation for the purpose of submitting to a vote of such stockholders the question of such change of name, change of place of business, increase or decrease of number of directors, managers or trustees, increase or decrease or change the par value of capital stock, extension of duration of its charter, or consolidation with some other corporation, as the case may be: Provided, that in changing the name of any corporation under the provisions hereof, no name shall be assumed or adopted by any corporation organized under the laws of this State without the consent

of such other corporation, and that in no case shall the capital stock be diminished to the prejudice of the creditors of such corporation, or the number of directors, managers or trustees be reduced to less than three or increased to more than a number to be determined by the stockholders, nor shall the place of business of any bank or banking association located in any city, village or incorporated town, be changed to any other city, village or town, nor shall the place of business of any bank or banking association not located in an incorporated village, town or city, be changed to any village, town or city, or to any place more than five miles from its existing place of business.

Such special meeting shall be called by delivering personally, or by depositing in the post office at least thirty days before the time fixed for such meeting, a notice addressed to each stockholder at his residence as shown by the books of the bank, signed by a majority of said directors, managers or trustees, stating the time, place and object of such meeting. A general notice of the time, place and object of such meeting shall also be published, once each week, for three successive weeks in some newspaper printed in or nearest to the county in which the principal business office of said corporation is located. At any such meeting stockholders may vote in person or by proxy, each stockholder being entitled to one vote for each share of stock held by him, and votes representing two thirds of all stock of the corporation shall be necessary for the adoption of the proposed change of name, place of business, number of directors, managers or trustees, amount and par value of capital stock, extension of duration of charter or consolidation with some other company. At any regular meeting, or at the time and place specified in said notice of a special meeting called for that purpose, said propositions, or any of them, may be submitted to a vote, and if it shall appear that two thirds of all votes represented by the whole stock of such corporation are in favor of the propositions, or any of them, so submitted, a certificate thereof, verified by the affidavit of the president, or a vice-president, and under seal of the corporation, shall immediately be filed in the office of the Auditor, and if such change or changes shall be approved in writing by him, a like certificate, together with the Auditor's written approval, shall be filed forthwith for record in the office of the recorder of deeds of the

county where the principal business office of such corporation is located; whereupon the changes proposed and voted for at such meeting, as to name, place of business, increase or decrease or change of par value of capital stock, or number of directors, managers or trustees, extension of duration of charter, or consolidation with some other company, shall be and is hereby declared accomplished in accordance with the said vote of the stockholders.

And provided, further, that any corporation with banking powers availing itself of or accepting the benefits of, or formed under, this Act, and all corporations with banking powers existing by virtue of any special charter or general law of this State, shall be subject to the provisions and requirements of this Act in every particular, as if organized under this Act.

Such corporation shall, upon the filing of said certificate, in the recorder's office, cause to be published in some newspaper in or nearest the county in which their principal office is located a notice of such change of organization, once each week, for three successive weeks.

Such change of name, place of business, increase or decrease or change of par value of capital stock, increase or decrease of number of directors, managers or trustees, extension of duration of charter, or consolidation of one corporation with another, shall not affect suits pending in which such corporations or corporation shall be parties; nor shall such changes affect causes of action, nor the rights of persons in any particular; nor shall suits brought against such corporation by its former name be abated for that cause.

With the approval in writing of the Auditor of Public Accounts, which approval shall state that the proposed sale is, in his opinion, necessary for the protection of the depositors and other creditors, any corporation with banking powers may, by a vote of two-thirds of its directors and without a vote of its stockholders, sell all or any part of its assets to another corporation organized under the banking laws of this State or of the United States, provided such other corporation assumes in writing, all of the liabilities of said corporation as shown by its records, other than its liabilities to its stockholders as such.

Any stockholder objecting to any action of the corporation in leasing, exchanging or selling all of its corporate assets, or objecting to a merger or consolidation with another corporation (the corporation acquiring such assets by lease, exchange, sale, merger or consolidation being hereinafter referred to as the "acquiring corporation"), shall be obligated to sell and transfer to the acquiring corporation and the acquiring corporation shall become and be obligated to purchase such share or shares, together with all rights and interests thereby represented, including all all cash or securities or other benefits accruing to such share or shares from or by reason of the sale, lease, merger, or consolidation at a price equal to the fair value of such share or shares with interest on such fair value at the rate of five per cent per annum from the date such sale, lease, merger or consolidation was consummated. If such fair value and interest is not paid to such objecting stockholders by such acquiring corporation within thirty days after a mailing of notice thereof to the stockholder at his last known address as shown by the records of the corporation, of such sale, lease, merger, or consolidation, then such objecting stockholder may, within sixty days thereafter, file a petition in the Circuit Court of the county in which the principal office of the acquiring corporation is located, asking for a finding and determination of the fair value of such shares of stock. Upon the filing of such petition, the practice and procedure thereon shall be the same, as far as practicable, as that under the eminent domain laws of this State, but the court shall have full power and authority to do all things and enter all such orders as it may deem equitable and just for the purpose of preserving and protecting the rights of the parties of the proceeding during the pendency thereof. Such fair values shall be ascertained and determined as of the date of the consummation of such sale, lease, merger or consolidation, and without regard to any depreciation or appreciation because of or on account of such sale, lease, merger or consolidation.

The Court shall enter judgment against such acquiring corporation for the amount of such fair value, and interest thereon, which judgment may be collected as other judgments at law. Upon the payment of such judgment such stockholder shall cease to have any interest in such stock

or in the property of the corporation. Such stock may be held and disposed of by the corporation as it shall see fit.

Unless such objecting stockholder shall file such petition within the time herein limited, such stockhodler and those claiming under him shall be conclusively presumed to have authorized, approved and ratified such sale, lease, merger or consolidation. If, at the expiration of thirty days from the time of the consummation of such sale, lease, merger or consolidation, the person in whose name such share or shares shall stand, shall not be living, or shall be under disability, his executor, administrator, guardian or conservator as the case may be, shall be entitled to file such petition within ninety days after mailing of a notice thereof to the stockholder at his last known address as shown by the records of the corporation, of the consummation of such sale, lease, merger or consolidation. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at Statewide referendum, Nov. 4, 1930.]

**13. Records of change to be filed.**] § 13. Before the Auditor shall approve any such proposed consolidation he shall require to be filed with him a complete record of the proceedings of such consolidation, a list of stockholders, the agreement or articles of consolidation approved by the stockholders, which shall include the amount of capital and surplus of the consolidated corporation, the plan of business, name and time for which such consolidated corporation shall continue, which shall comply with the requirements of this Act as to application for and organization in the case of a new association, a detailed financial statement showing the assets and liabilities of such proposed consolidation and such other records as he may deem necessary, verified by the affidavit of one or more of the officers of each consolidating corporations, and shall satisfy himself that said records and list are true and complete and that said financial statement is true and that a sufficient amount is dedicated to the business of such proposed consolidation.

The Auditor shall also require each director of such corporation to take and subscribe an oath of fealty as provided by Section 4 of this Act.

In the even any person shall make a fraudulent affidavit or oath he shall be deemed guilty of perjury.

The Auditor may, by himself, or some competent person of his appointment, make an examination into the affairs of such corporation, the expenses of which examination as determined by the Auditor, shall be paid by said corporation. [As amended by act approved June 4, 1929, L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

**15. Proceeding for dissolution—Fees.**] § 15. Any association organized under this Act or any corporation with banking powers organized in pursuance of any general or special law of this State, or any consolidated corporation with banking powers as provided for by this Act, on depositing with the Auditor an amount of money equal to the whole amount of debts and demands against it, including the expenses of this proceeding, or upon making a contract in writing, approved by the Auditor, by which another bank or banking association incorporated under the laws of this State or of the United States assumes the whole amount of debts and demands against it, an executed copy of which contract shall be deposited with the Auditor, may determine its affairs, distribute its assets among its stockholders, resign its charter or certificate of incorporation, and close up its business, by a resolution passed at a meeting of its stockholders called for such purpose. The Auditor shall cause a copy of such resolution to be published in some newspaper published in the city or village where such bank or corporation is located; or if no newspaper shall there be published, then in the newspaper nearest to such city or village, and the Auditor shall in such publication also give notice that the notes and demands against such bank or corporation will be redeemed by him, or by the bank or banking association which has assumed the debts and demands against such bank or corporation, and if any outstanding notes or other demands are not presented in one year, such bank may deposit with the Auitor or elsewhere, under his direction, and subject to his order, on interest a sum sufficient to meet such outstanding demands, which when presented to the Auditor, shall be paid by him out of such sum and after six years from the day on which the publication of the dissolution was first made, the Auditor shall return to the stockholders, to be among them distributed pro rata, the remainder of any sum so deposited.

The Auditor shall be entitled to two per cent of all money deposited with and paid out by him under the provisions of this section, where the amount so paid, on account of any one bank or corporation, shall not exceed five thousand dollars, and one per cent, after that. [As amended by act approved June 4, 1929, L. 1929, p. 174; ratified at Statewide referendum, Nov. 4, 1930.]

## "E".

**(Excerpts pertinent to meaning and validity of the McFadden Act from briefs filed in the Court of Appeals by the respondent Bank, certified copies of which have been filed in these proceedings in this Court.)**

### Opening Brief of First National Bank.

On February 11, 1929, the First Trust and Savings Bank, pursuant to the provisions of Section 12 of the Illinois Banking Act, consolidated with the Union Trust Company, another Illinois banking corporation having power to administer trusts . . . on July 17, 1933, pursuant to the authority granted by the McFadden Act, 44 Stat. 1224-1226, as amended, 48 Stat. 190, the First Union was consolidated with the First National Bank which then clearly had power to execute trusts. After each consolidation, the consolidated bank continued to administer the trust created by the will of Otto Young on exactly the same basis as before. . . . The District Court held (1) that plaintiff was a devisee of an heir of a vested remainderman and, therefore, had standing to maintain this suit, and (2) that the trusteeship was vacant and defendant bank should be required to account as a trustee *de son tort* for all losses and fees since 1929. (Pp. 4-5.)

Because of the great importance of the consolidation issue to the defendant First National, to many other Illinois banks, and to the Bar generally, the Court is respectfully and earnestly urged to rule on this question whether or not it concludes that the interests given to Otto Young's grandchildren are contingent. The District Court's ruling on the effect of the consolidations involved in this case is so completely at war with the uniform practice of banking institutions in Illinois, and the law as it has been understood by both the lower and appellate courts of Illinois that its effect, if ultimately sustained, on many years of administration of thousands of Illinois trusts, can not possibly be foreseen. (Pp. 6-7.)

It is true that in both cases (*Scheidel Coil Co.* v. *Rose*, 242 Ill. 484; *Chicago Title & Trust Co.* v. *Doyle*, 259 Ill.

489), in order to determine whether a consolidated corporation should pay fees to the Secretary of State as a new corporation, the Court held that the legal existence of the old corporations had terminated. But it is important to note that in neither opinion did the Court make any suggestion that the existence or nonexistence of the constituent corporation should affect in any respect the transfer of rights to the new company. The general rule that all *rights* pass to the new corporation was reaffirmed by these decisions. Accepting the general rule that all rights and duties possessed by the original corporations pass by virtue of a consolidation to the new corporation, the question which remains is whether fiduciary rights and duties are excepted from that general rule. In passing, it may be noted that the fact that the technical existence of the old corporation terminates upon consolidation has no bearing on that question. (Pp. 28-29.)

The (Illinois) Supreme Court took note of the *Scheidel Coil Co.* and *Doyle* cases and recognized that the Real Estate Title and Trust Company, as such, went out of existence upon consolidation. . . . Next, the Court restated the general rule as to the consequences of the consolidation. "By the consolidation of the Real Estate Title and Trust Company and the Chicago Title and Trust Company, the original corporations ceased to exist. . . ." (Pp. 31-32.)

There is, of course, no reason why a testator may not express a contrary intent. He could provide, for example, that a change of name of the corporate trustee would create a vacancy and require the appointment of a new trustee. (P. 36.)

Under the clear and unambiguous language of the federal statute, there can be no doubt, since in Illinois this "national act is the basis of the authority for the consolidation" of the First Union Trust with the First National, that trusts held by the First Union Trust passed to the First National in 1933. (P. 51.)

The fact that the McFadden Act was enacted after the death of Otto Young is, of course, of no significance. The Act as amended in 1933 was passed prior to the consolidation of the First Union and the First National and expressly provides for the continuation of trusteeships in the consolidated bank. Moreover, under the rule of the *Zinser*

case it does not matter whether Otto Young ever actually contemplated that this particular consolidated bank would execute the trust established under his will. The *Zinser* decision did not rest on proof of Etta Nelson's actual intent with respect to the consolidated corporation. No showing as to her *actual intent* was made in that case. Instead, because she was presumed to have contemplated the possibility of a lawful consolidation in naming a corporation, she was likewise *presumed to have intended* also to appoint any corporation of which that named trustee might become a component part through consolidation. The First National Bank falls within the scope of Otto Young's *presumed intent* whether or not he ever actually realized that that particular bank might consolidate with the First Union Trust. (Pp. 53-54.)

Moreover, the point upon which the court below entirely relied in holding the trust vacant has no application to the instant consolidation under the McFadden Act. The corporate life of the constituent corporations is not extinguished by such a consolidation. By an amendment of June 16, 1933 to the McFadden Act, it is provided that upon consolidation of a state bank with a national bank "the corporate existence" of the state bank and the national bank are "merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions." (P. 54.)

On the consolidation of the First Union Trust and Savings Bank with The First National Bank of Chicago on July 17, 1933, the First Union Trust and Savings Bank was consolidated with and "merged into" The First National Bank of Chicago. Under this consolidation, therefore, the corporate existence of the First Union Trust and Savings Bank was continued in the First National Bank of Chicago, and the fiduciary powers enjoyed by the First Union Trust and Savings Bank were undisturbed although exercised by The First National as the *alter ego* of its constituent corporation. (P. 54.)

The First Union Trust and Savings Bank, having been lawfully vested with all the rights and powers of trustee under the Otto Young will, *a fortiori,* such powers were not divested by consolidation with The First National bank

under the provisions of the McFadden Act. Neither Illinois statutory law nor decisions of its courts of appeal can be pointed to which would be contravened by the consolidation of a state and national bank under the provisions of the McFadden Act. (P. 55.)

**Reply Brief of First National Bank.**

In its original brief and argument, The First National Bank of Chicago stressed the importance of the District Court's ruling on the consolidation issue. The Bank then assumed that its power to convey property and otherwise to enter into binding contracts had not been called into question in this cause, and it further assumed that no question had been raised as to the validity of either of the consolidations.

Plaintiff now takes the position that neither assumption was justified. She argues here that there has been no trustee with power to deal with the trust assets since the 1929 consolidation. Therefore, in plaintiff's view, every contract or conveyance made by an Illinois corporate trustee subsequent to a comparable consolidation is either void or at least voidable. And it now also appears *for the first time* that the validity of the 1933 consolidation is challenged. Plaintiff adopts the argument of Mr. Sullivan who contends that The First National Bank, and presumably every other national bank which has consolidated with an Illinois Bank, "is not, and never was, a corporation, either *dejure* or *de facto.*" Thus does plaintiff ask this Court to sow the seeds of a ripe litigious harvest.

The consolidation issue is, indeed, an important issue which should be analyzed carefully before this Court. Properly analyzed, there can be no doubt that the issue should be resolved in favor of the Bank. Doubts can arise only from confusion of the questions presented by this issue. Consequently the stategy which should give plaintiff her only chance of success is a strategy designed to obfuscate and to confuse. (Pp. 2-3.)

It seems desirable first to identify the questions which the Court must face, and then to discuss the arguments bearing on each question separately.

These five questions are:

1. What is the effect of the *Zinser* case on the *appointment* of a corporate trustee?

2. Having in mind the answer to that question, what is the meaning of the successorship clause in Otto Young's will?

3. Was the 1933 consolidation valid?

4. What was the effect of the 1933 consolidation?

5. What is the measure of liability of an Illinois trustee *de son tort?*

The first two questions relate primarily to the 1929 consolidation. Unless the trusteeship survived this consolidation, there is no occasion for giving any consideration to the 1933 consolidation or to any Federal statute.

The third and fourth questions relate to the 1933 consolidation. In the Bank's original brief it was stated that the effect of the 1929 consolidation necessarily determines the *effect* of the 1933 consolidation. Plaintiff has apparently realized the accuracy of this statement because now she has shifted her attack to challenge the *validity* of the 1933 consolidation. If the first three questions are answered favorably to the Bank, it necessarily follows that the fourth question, *i. e.*, the *effect* of the 1933 consolidation, must also be answered favorably to the Bank.

The fifth question is of course not reached unless the Court concludes that there is a vacancy in the trust.

These five questions will be discussed in order. (Pp. 5.6.)

**Absent either contravening or enabling state legislation, the McFadden Act, which has been held constitutional by the United States Supreme Court, authorizes the consolidation of State Bank with National Banks.**

In 1927 the Congress enacted the McFadden Act to authorize the consolidation of state and national banks. (44 Stat. 1224-1226.) In that statute it is stated that:

> "No such consolidation shall be in contravention of the law of the State under which such bank is incorporated." 44 Stat. 1226; 12 U. S. C. 34a.

But Congress did not provide that the State must pass enabling legislation before the Federal Statute is operative.

In terms the McFadden Act authorizes the consolidation of state and national banks so long as the consolidation is not in contravention of state law. Assuming for the present, therefore, that Illinois has expressed neither an affirmative nor a negative policy with respect to consolidations under the McFadden Act, it is clear that the Act should be construed to apply in Illinois. It has been so construed repeatedly in other states. See e. g. *Ex parte Worcester National Bank,* 162 N. E. 217 (Mass.); *First National Bank of Chattanooga* v. *Chapman Co.,* 22 S. W. 2d 245 (Tenn.); *Hofheimer* v. *Seaboard National Bank,* 153 S. E. 656, 658 (Va.); *Adams* v. *Atlantic National Bank,* 155 So. 648 (Fla.). (Pp. 22-23.)

The 1933 consolidation was therefore valid unless plaintiff can demonstrate one of two things: (1) that the *Worcester Bank* case has been overruled, or (2) that the consolidation was prohibited by Illinois law. The latter point will be deferred momentarily, and the former point needs but brief mention.

Neither Mr. Sullivan nor plaintiff even cites the United States Supreme Court decision in the *Worcester Bank* case, so it is manifest that they cannot be arguing that it has been overruled. Apparently, however, the guardian *ad litem* does take the position that the United States Supreme Court was in error in the *Worcester Bank* decision although he never expressly states that the case has been overruled. Instead, he tries to convey that impression by quoting certain portions of the opinion in *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315.

The short answer to that oblique argument is that the *Hopkins* case does not purport to overrule the *Worcester Bank* case, and in fact does not even cite it except once in connection with a question of statutory construction. (See 296 U. S., at 334.) Nor is it likely that the unanimous opinion in the *Hopkins* case in 1935 was intended to overrule the unanimous decision rendered only six years earlier in the *Worcester Bank* case. The six justices who participated in both decisions (Van Devanter, McReynolds, Brandeis, Sutherland, Butler, and Stone, JJ.) never indicated any such irresolution in their other work on the Court.

In the *Hopkins* case the Supreme Court merely held that the Federal Home Owners' Loan Act of 1933 was uncon-

stitutional to the extent that it purported to authorize the conversion of state building and loan association into federal associations *in contravention of the laws of the State of their creation.* The United States Supreme Court thus sustained the challenge to the Act by the Wisconsin State Banking Commission, which was able to demonstrate that a conflict existed between the State and Federal laws. No question as to the power of Congress in the absence of such a conflict was before the Court, and the Court made no attempt to overrule the *Worcester Bank* holding.

Absent contravening state law, state banks may consolidate with national banks pursuant to the Federal consolidation statute just as state banks may convert to national banks pursuant to the Federal conversion statute, 12 U. S. C. 35. No Illinois statutory authority was needed to accomplish either the conversion of Illinois banks to national banks or the consolidation of Illinois banks with national banks. See Illinois Attorney General's Report and Opinions, 1927, 316, 319; *Id.*, 1934, 378.

Assuming that Illinois is silent on the question of the legality of a consolidation of a state and national bank, it is therefore clear that the 1933 consolidation was valid. (Pp. 24-26.)

The clearest evidence, however, is afforded by the square holding of the Illinois Appellate Court in *First National Bank* v. *Lindberg,* 293 Ill. App. 474 (1938), a case which Mr. Sullivan agrees was "properly decided". There the Court held that since there was statutory authority for the 1933 consolidation between the First Union Trust and the First National (the identical consolidation involved in the case at bar), the validity of that consolidation could only be questioned by the Attorney General of Illinois.

In that case the unsuccessful appellant relied on the identical authorities relied on by plaintiff, *et al.* in the case at bar. Citing *American Loan & Trust Co.* v. *Minnesota & N. W. R. Co.,* 157 Ill. 641, and *Gunggoll* v. *Outer Drive Athletic Club,* 349 Ill. 406, the appellant in the *Lindberg* case properly contended (1) that a consolidation is void if not authorized by any statute, and (2) that a void consolidation may be attacked collaterally. If, however, there is statutory authority for the consolidation, it has at least *de facto* validity and is subject to attack only by the At-

torney General of the State. *Fiedler* v. *Eckfeldt*, 335 Ill. 11; *Hudson* v. *Green Hill Seminary Corp.*, 113 Ill. 618. For the appellant to prevail in the *Lindberg* case it was therefore essential for him to demonstrate that there was no statutory authority for the 1933 consolidation. He made the same argument made by plaintiff *et al.* here, relying primarily on *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315. But the Illinois Appellate Court rejected the argument because there was statutory authority for the 1933 consolidation. It flatly stated (293 Ill. App. at 481):

> "It does not appear from anything called to our attention that it was necessary to specifically authorize the consolidation of a State bank with a national bank to give effect to the powers and authorities conferred by the national act. Therefore, in the absence of a State statute prohibiting such consolidation, the national act applies and is the basis of the authority for the consolidation."

This is a statement of the ground of the Appellate Court's decision and that ground is dispositive of the issue belatedly raised by plaintiff, *et al.* on this appeal. For the Court could not have denied the appellant in the *Lindberg* case the right to attack the validity of the consolidation unless it found a statutory basis for the consolidation; if the McFadden Act had not provided the necessary statutory authority, the consolidation would have been completely void and therefore subject to collateral attack.

The Illinois Appellate Court has therefore squarely held that the McFadden Act authorized the 1933 consolidation attacked by plaintiff, *et al.* in the case at bar. (Pp. 27-28.)

Moreover it is appropriate to mention the fact that the administrative interpretation of the statute is uniformly in accord with the judicial interpretation found in the *Lindberg* case. The United States Comptrollers of the Currency and the Auditors of Public Accounts of the State of Illinois, the highest fiscal officers directly concerned with this problem, have given their express approval to some 23 consolidations of Illinois banks with national banks. The opinion of these experts, reaffirmed as recently as 1946, points up the absurdity of plaintiff's contention that none of those national banks has any legal existence "either *de jure* or *de facto*".

The Bank has consistently referred to the 1933 consolidation as a "consolidation". Plaintiff *et al.* are very careful never to refer to this "unification" as a "consolidation"; they criticize the Bank for miscalling the transaction a consolidation and for relying upon statutes and authorities dealing solely with consolidations. One of those statutes dealing solely with consolidations is the McFadden Act. In that statute Congress used the term "consolidation" in authorizing the very transaction under discussion. Despite the fact that one of the consequences of the 1933 consolidation is different from that attending Professor Bogert's theoretical definition of "consolidation", the Bank feels that it is more appropriate to use the statutory term than any of the alternatives suggested by plaintiff.

It has already been demonstated above that this statute authorized the 1933 consolidation if it was not in contravention of Illinois law, and further that the Illinois Appellate Court has already held that the McFadden Act provided the statutory authority for this very consolidation. *First National Bank* v. *Lindberg,* 293 Ill. App. 474. Nevertheless Mr. Sullivan and the guardian *ad litem* have made a series of specious arguments designed to prove that the 1933 consolidation was in contravention of Illinois law. These arguments will be refuted separately even though the *Lindberg* case is a complete answer to all of them.

Mr. Sullivan first argues that since no error has been assigned with respect to the statement of the Court below that on "July 17, 1933, the First Union Trust and Savings Bank was merged with the First National Bank of Chicago", that statement cannot be controverted on this appeal. Since the validity of the consolidation under the McFadden Act was not chalenged below, but only the effect of compliance with that Act was in question, it was immaterial to defendants what terms the trial court used in referring to the 1933 consolidation. The statute itself is controlling and reference to the Act shows that it was a consolidation, which in certain respects is given the incidents generally ascribed to a merger.

Mr. Sullivan's principal argument is that the 1933 consolidation was really an attempted merger which was void because mergers of banking corporations are not authorized (and hence are forbidden) by Illinois statute.

There are at least three complete answers to this argument. First, Illinois statutory authority for the so-called merger was unnecessary because the Federal statute afforded the necessary authority. In the *Lindberg* case the Illinois Appellate Court squarely held that the McFadden Act "applies and is the basis of the authority for the consolidation." 293 Ill. App. 474, 481. The case of *American Loan and Trust Co.* v. *Minnesota & N. W. R. Co.*, 157 Ill. 641, on which Mr. Sullivan places his primary reliance, is completely inapposite because the Court was there dealing with a situation where "there was *no statute* under which the consolidation could have been made * * *." 157 Ill. at 653. Similarly, the decision in *McRoberts* v. *Minier*, 270 Ill. App. 1, was grounded on the fact that *Federal* authorization for the attempted consolidation was lacking. Here there was a Federal statute which authorized the 1933 consolidation.

The second complete answer to Mr. Sullivan's "merger" argument is apparent from the very authorities which he quotes on pages 14 and 15 of his brief. These cases make it clear that the name given to the transaction is not important. In *Chicago Title & Trust Co.* v. *Doyle*, 259 Ill. 489, 496, an attempted merger was held to be a consolidation because the controlling statute authorized consolidation but not merger. In the instant case the McFadden Act, as amended in 1933, authorized a consolidation which had one consequence normally associated with a merger. Since the statute is controlling, and since the First Union and the First National admittedly complied with the McFadden Act, it follows that the parties accomplished the type of consolidation authorized by that Act.

For the third answer to the argument it may be assumed *arguendo* that the McFadden Act, as amended in 1933, is inapplicable in Illinois to the extent that it provides for the continuation of the corporate existence of the constituent banks in the consolidated bank. But this consequence of the consolidation does not affect the validity of the consolidation itself. The provision for this particular consequence did not appear in the statute as enacted in 1927 (44 Stat. 1224-1226). It first appeared in the 1933 amendment (48 Stat. 190). Under Mr. Sullivan's reasoning, therefore, consolidations effected between 1927 and 1933 were valid, but those after 1933 were void. That is nonsense.

The fact that the 1933 amendment provides for the continuation of the corporate existence of the constituent banks as one consequence of the consolidation has no bearing on the question of the validity of the consolidation itself. The most that Mr. Sullivan's argument can possibly prove is that the 1933 consolidation was the type of consolidation authorized by the Illinois Banking Act rather than a merger. (Pp. 29-33.)

It may be true, as the guardian *ad litem* points out that four other states passed statutes expressly authorizing state banks to consolidate with national banks because it was assumed that such enabling legislation was necessary in those states. If the action of the legislatures of such states is explained on the ground of necessity, the inaction of the legislatures in Illinois and other states can be similarly explained on the ground that additional legislation in these states was *not* necessary. See e. g. *Ex parte Worcester National Bank,* 162 N. E. 217 (Mass.); *First National Bank of Chattanooga* v. *Chapman Co.,* 22 S. W. 2d 245 (Tenn.); *Hofheimer* v. *Seaboard National Bank,* 153 S. E. 656, 658 (Ga.); and *Adams* v. *Atlantic National Bank,* 155 So. 648 (Fla.). (Pp. 37-38.)

As stated in the Bank's principal brief, the McFadden Act expressly provides that trusts held by a state bank prior to consolidation with a national bank shall be executed by the national bank after the consolidation. Since it was held in the *Lindberg* case that the McFadden Act afforded the statutory authority for the 1933 consolidation, it is clear that the First National Bank became trustee of Otto Young's trust estate upon consolidation with the First Union.

Plaintiff *et al.* have tried to avoid this conclusion by making two inconsistent arguments. First, they argue repeatedly that the 1933 consolidation was really a merger, and therefore that the *Zinser* case, which in terms deals only with consolidations, is inapplicable. We agree that the 1933 consolidation had, as one of its consequences, the merging and continuation of the corporate existence of two banks in the resultant bank. But if it follows that the 1933 transaction was therefore a merger within the meaning of the *Zinser* opinion, there is no need for reliance on the *Zinser* case. For if there is no corporate death, there is

certainly no basis for the argument that the consolidation created a vacancy.

Secondly, plaintiff *et al.* argue that the McFadden Act is inapplicable in Illinois because the provision for continuation of the corporate life of the constituent banks in their single successor is contrary to Illinois law. It is true that corporate existence is terminated by a consolidation under the Illinois Banking Act. But Illinois has never expressed any policy against mergers or against consolidations which have as one consequence the merging of the corporate existence of two banks. On the contrary, the Illinois Appellate Court has squarely held that such a consolidation under the McFadden Act is authorized in Illinois. The mere fact that Illinois has not authorized the merger of two Illinois Banks certainly establishes no public policy against mergers under a Federal statute which is operative in Illinois.

But even assuming, *arguendo,* that the merger language in the McFadden Act is inapplicable in Illinois, the statute still provides expressly for the automatic succession of the trusteeship. Even if the words dealing with continuation of corporate existence were eliminated from the statute, it would still provide that the "* * * consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights * * * as trustee * * * to the same extent as such rights * * * were held or enjoyed by any such constituent institution at the time of such consolidation." 48 Stat. 190.

The argument that the rule of the *Zinser* case has no application to the 1933 consolidation because the McFadden Act was enacted after the death of Otto Young repeats an error made throughout the briefs of plaintiff *et al.* That error is the failure to appreciate that the *Zinser* decision was predicated not on the testatrix' actual intent, but rather on her presumed intent. The Illinois Supreme Court did not hold that Etta Nelson actually contemplated the consolidation of two particular corporations. On the contrary, since no evidence as to her actual intent was adduced, the Court held as a matter of law that "Etta Nelson, in naming the Real Estate Title and Trust Company as executor and trustee, knew * * * that the statute

authorized * * * the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that * * * the Real Estate Title and Trust Company might be consolidated with some other corporation * * *" 264 Ill. at 35-36. Similarly, Otto Young must be deemed to have contemplated the consolidation of the First Trust and also of the First Union Trust "with any other corporation then existing or that might thereafter be organized." We think it is clear that in the language of the *Zinser* case The First National was at the time Otto Young drew his will a "corporation then existing or that might thereafter be organized." (Pp. 41-44.)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

## No. 789

MARGARET DE KORWIN, Individually, and as Executrix of the Estate of Joseph Maria de Korwin, deceased, and JOHN EDWARD SULLIVAN,

*Petitioners,*

*vs.*

THE FIRST NATIONAL BANK OF CHICAGO, a National banking association, individually, and as Trustee of the Estate of Otto Young, deceased, et al.,

*Respondents.*

**BRIEF OF RESPONDENT, THE FIRST NATIONAL BANK OF CHICAGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

EDWARD R. JOHNSTON,
J. F. DAMMANN,
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JOHN W. KEARNS,
*Attorneys for Respondent, The First National Bank of Chicago.*

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## BRIEF OF RESPONDENT, THE FIRST NATIONAL BANK OF CHICAGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

This brief is filed in behalf of respondent, The First National Bank of Chicago, the trustee under the will of Otto Young. Respondent bank opposes the petition for certiorari filed herein by Margaret De Korwin, the substituted plaintiff in the court below, and John Edward Sullivan, who was not a party to either of the judgments below, and therefore has no standing before this Court. To avoid confusion with the petitioners in causes Nos. 771-773 and 790, (which involve issues entirely distinct from the issue here presented) petitioner De Korwin will hereinafter be referred to as the Plaintiff.

The fourteen persons named by plaintiff as respondents to her petition, include, in addition to respondent bank, nine adult beneficiaries under the will of Otto Young, two general guardians for infant beneficiaries, the Guardian *ad Litem* for two infant beneficiaries, and the special trustee for unborn heirs. In the courts below all nine of these adult beneficiaries affirmatively supported the administration of the trust by this respondent.[1] The general guardians stated that they would abide the decision of the court but suggested that plaintiff's contentions were purely technical, involved no charge of maladministration, and might well result in substantial injury to the trust estate.[2] The special trustee for unborns took no position on this issue.[3] The Guardian *ad Litem*, however, consistently supported the plaintiff on all issues, but has not joined in the petition for certiorari.

**Opinions Below.**

The opinion of the District Court (R. 399) is reported at 84 F. Supp. 918. The opinion of the Court of Appeals (R. 484) is reported at 179 F. 2d 347.

**Jurisdiction.**

Plaintiff invokes the jurisdiction of this Court under 28 U.S.C. § 1254.

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[1] See Brief of Appellant Koch, pp. 3, 20-25; Reply Brief p. 2; Brief of Appellant Pratt, et al., pp. 3-4, 13-23; Reply Brief pp. 16-29.

[2] R. 375-376; See Brief of Dorothy Dilley Kaufman, Guardian, at pp. 2, 12; Brief of Jane Catherine Pulitzer, Guardian, at p. 3.

[3] R. 162-163, 372.

**Record.**

The Court has before it the following:

(a) The printed record filed with this Court in Cause No. 696, O.T. 1946, when review of the Court of Appeals decision on the question of jurisdiction was sought. It has been stipulated that this document may be considered a part of the record on this appeal (R. 480-481). It will be cited as "No. 696, R. —."

(b) The printed record of proceedings subsequent to this Court's denial of certiorari in No. 696. O.T. 1946. This document will be cited as "R. —."

(c) Certain Exhibits which were not printed. They will be cited as "Def. Ex. —."

(d) The Briefs filed in the court below. Plaintiff has lodged with the Court a certified copy of each of the briefs filed by this respondent in the Court of Appeals. Respondent subsequently lodged with the Court the entire set of briefs filed in the Court of Appeals. Appropriate reference will be made to such of these briefs as are cited.

## STATUTES INVOLVED.

### Illinois Banking Act.

Section 12: "Whenever the board of directors, managers or trustees of any corporation having banking powers existing by virtue of any general or special law of this State . . . may desire . . . to consolidate such corporation with any other corporation having banking powers which may hereafter exist, they may call a special meeting . . . Such . . . consolidation of one corporation with another shall not affect . . . causes of action nor the rights of persons in any particular. . . ." Ill. Rev. Stat. (1949) ch. 16½, § 12.

(This provision has been in force since 1888.)

**National Banking Act (McFadden Act).**

"Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same State, county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon. . . . No such consolidation shall be in contravention of the law of the State under which such bank is incorporated." 44 Stat. 1224-1226, as amended, 48 Stat. 190-191. 12 U.S.C. § 34a.

## QUESTION PRESENTED.

Whether the law of the State of Illinois was contravened by the consolidation in 1933 of this respondent, a national bank, with the First Union Trust & Savings Bank, an Illinois banking corporation, pursuant to the provisions of the McFadden Act (44 Stat. 1224-1226, 48 Stat. 190-191, 12 U.S.C. § 34a).

### Plaintiff's Theory.

Plaintiff argues that the State of Illinois has not given its consent to the consolidation of Illinois banks with national banks, and that, as a matter of Illinois law, the absence of such consent is the equivalent of an express prohibition against such consolidations.

### Respondent Bank's Theory.

Respondent bank contends that the State of Illinois—through its legislature, through its courts, and through its executive officials—has unequivocally consented to consolidations between Illinois banks and national banks. In fact, the very consolidation involved in the instant case was sustained by the Illinois appellate courts in a case

in which this Court denied a certiorari petition presenting precisely the same question raised by the instant petition.

Furthermore, apart from the merits, the Court should exercise its discretion to deny certiorari because (a) the question now presented was not properly raised in the courts below, and (b) the question is purely a matter of state law.

## STATEMENT OF FACTS.

Plaintiff states that in 1933 respondent bank, acting in contravention of Illinois law and contrary to the intent of Otto Young, "seized" the assets of the Otto Young trust estate. (Pet. 4.) The events leading up to this so-called seizure may be briefly outlined.

From 1888 until the date of his death in 1906, Otto Young owned a substantial stock interest in respondent, The First National Bank of Chicago.[4] In 1903 he took an active part in the formation of the First Trust and Savings Bank, an Illinois corporation, which was formed as a corporate affiliate of respondent national bank primarily for the purpose of administering trusts[5] Throughout its existence the First Trust was subject to exactly the same ownership, control and management as respondent.[6] From December of 1903 until his death three years later, Otto Young served as a director of both banks.[7]

In 1905 Otto Young executed his will naming the First Trust as his executor and trustee.[8] The will provided

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[4] Def. Ex. 2, 3, 5, 6, 30; R. 314-316.

[5] Def. Ex. 3-15, 20, 30-32; R. 314-316. See Comment, 17 Univ. of Chi. Law Rev. 512, 513-514 (1950).

[6] Ibid.

[7] Def. Ex. 3, 4; R. 314-316.

[8] R. 150-158, 400-401.

that in the event the trustee "shall refuse to qualify or act, or further act, as trustee," a court should appoint a new trustee with the approval of at least one-half of the group comprising his widow and then living children.[9]

After the death of the testator in 1906 the First Trust accepted the trusteeship.[10] Neither the First Trust nor its corporate successors by consolidation ever refused to act as trustee. As required by the will, every year the trustee has accounted to the beneficiaries.[11] No beneficiary has ever criticized these accounts, or, with the exception of plaintiff, ever sought an accounting in court. The only time this trust has had to bear the expense of a court accounting was after the death of Otto Young's widow in 1916, when the trustee found it necessary to obtain judicial instructions with respect to the distribution of certain income.[12]

In 1929 the First Trust entered into a consolidation with the Union Trust Company, another Illinois banking corporation.[13] The resulting Illinois corporation took the name First Union Trust and Savings Bank.[14] First Union continued to act as the trust affiliate of respondent national bank, subject to the same ownership and control as respondent, and continued the administration of the trusts previously administered by First Trust.[15]

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[9] R. 157, 422.

[10] No court approval of the acceptance of a testamentary trust is required in Illinois, and none was obtained.

[11] R. 318-320.

[12] R. 401-402. Illinois law does not require a court accounting of testamentary trusts.

[13] Def. Ex. 17-19; R. 250-254, 315, 403.

[14] Def. Ex. 21; R. 146, 315.

[15] R. 251; Def. Ex. 17, p. 3; R. 315.

After the 1929 consolidation the Otto Young trust was administered by the same personnel as before.

In 1933 the First Union and respondent entered into the consolidation which is attacked in plaintiff's petition for certiorari.[16] This consolidation, like all other consolidations of Illinois banks with national banks, was specifically approved by the Auditor of Public Accounts of the State of Illinois,[17] and by the Comptroller of the Currency of the United States, the officials respectively charged with the chartering and supervision of state and national banks.[18] In practical effect the national bank merely absorbed its state affiliate. The same personnel continued to administer the Otto Young trust after the 1933 consolidation as well as after the 1929 consolidation.

**History of this Litigation.**

In 1943, Count Joseph de Korwin, a citizen of Poland, commenced this action (1) to establish an interest in the Otto Young trust, and (2) to require respondent bank to account in court as a trustee *de son tort*.[19] Federal jurisdiction, which was predicated on diversity of citizenship, was successfully challenged in the District Court,[20] but ultimately sustained on appeal.[21]

In the pleadings no attack was made on the validity of the 1933 consolidation. In her second amended complaint, filed after the appeal on the question of jurisdiction and after she had been substituted as plaintiff, the present

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[16] Def. Ex. 22-29; R. 146-147, 315, 403.
[17] Def. Ex. 28; R. 315.
[18] Def. Ex. 27; R. 315.
[19] No. 696, R. 3-31.
[20] No. 696, R. 161-163.
[21] See 156 F 2d. 855, cert. den. 329 U. S. 795 (1946).

plaintiff specifically alleged the 1933 consolidation without questioning its validity.[22]

Her claim that there was a vacancy in the trusteeship was based on the contention that the 1929 consolidation of two Illinois corporations, though valid, was a "refusal to further act as trustee" within the meaning of the successorship clause of Otto Young's Will.[23] Accordingly, she argued, the 1929 consolidation had the effect of creating a vacancy. Since, as she further argued, the alleged

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[22] In her second amended complaint plaintiff alleged:

> "that on July 17, 1933, the First Union Trust and Savings Bank merged with and into The First National Bank of Chicago, a national banking association, pursuant to approval on such date of a certificate in that behalf by the Auditor of Public Accounts of the State of Illinois, and pursuant to a certificate of consolidation and merger issued on July 17, 1933, by the Comptroller of Currency of the United States under the provisions and by authority of the National Banking Act, or more specifically the act of Congress known as the McFadden Act of 1927." (R. 146-147.)

See also paragraph 7 of the Cross-Claim filed by the Guardian Ad Litem (who has consistently supported plaintiff in this litigation). He alleged:

> "That the First Trust and Savings Bank of Chicago, after its consolidation with the Union Trust Company and after changing its name to First Union Trust & Savings Bank, consolidated with the First National Bank of Chicago, defendant herein, upon the terms and conditions set forth in said Consolidation Agreement, by the terms of which the First National Bank of Chicago, defendant herein, assumed all the liabilities of the First Union Trust & Savings Bank, and among said liabilities the said First National Bank of Chicago assumed the liabilities of the First Trust & Savings Bank and First Union Trust & Savings Bank as trustees de son tort of the Last Will and Testament of Otto Young, deceased, and should be required to account for all the liabilities chargeable to the First Union Trust and Savings Bank as such trustees de son tort." (R. 182-183.)

[23] R. 145-148.

vacancy was never filled by the procedure prescribed in the will, it supposedly followed that the trust had been administered by a trustee *de son tort* since 1929.

Respondent bank answered denying plaintiff's interest in the estate, and hence her standing to challenge its trusteeship, and denying that there had ever been a vacancy.[24]

The District Court held (1) that plaintiff had a vested interest in the *corpus* of the estate[25] and (2) that the 1929 consolidation created a vacancy in the trust because it was a "refusal to further act" within the meaning of the Will.[26] In the District Court no attack was made on the validity of either consolidation; the finding of vacancy was predicated entirely on the *effect of the 1929 consolidation.*

In determining the extent of respondent bank's liability, however, the District Court did have occasion to make a finding with respect to the validity of the 1933 consolidation. Plaintiff sought to impose an absolute liability on respondent for the administration of the trust since the 1929 consolidation.[27] Since, however, the court had found that respondent had been a trustee *de son tort* only since the 1933 consolidation, liability for the 1929-1933 period could not be imposed on respondent unless it had assumed the liabilities of the First Union. Accordingly, and for the benefit of plaintiff, the District Court expressly found that

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[24] R. 226-244.
[25] R. 408-421.
[26] R. 422-427.
[27] R. 146-148.

respondent assumed the 1929-1933 liability *by virtue of the 1933 consolidation.*[28]

Having found that the 1929 consolidation resulted in a vacancy and that by virtue of the 1933 consolidation the respondent bank was liable for all losses since 1929, the District Court ordered an accounting and appointed John Edward Sullivan special trustee *pendente lite* to prosecute the accounting.[29] Mr. Sullivan's appointment stemmed solely from the District Court's conclusion that the trust was vacant. He was not a party to the judgment which appointed him.

In seeking a reversal of that judgment in the Court of Appeals, this respondent pointed out in its opening brief that there was no question as to the *validity* of either of the consolidations.[30] It was argued that as a matter of Illinois law the District Court erred in holding that the *effect* of the 1929 consolidation had been to create a vacancy, and that neither the 1929 nor the 1933 consolidation was a "refusal to further act" as trustee within the meaning of the will.[31]

The Court of Appeals unanimously reversed those portions of the decree of the District Court declaring the trusteeship vacant, ordering respondent to account as a trustee *de son tort,* and appointing Mr. Sullivan a special

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[28] "It is also clear, and this court so finds, as a matter of law, that the First National Bank of Chicago, by virtue of the merger, aforesaid, assumed the liability, if any, of the First Union Trust & Savings Bank as trustee de son tort during the period from the date of the consolidation, aforesaid, February 11, 1929, to the date of the merger, aforesaid, July 17, 1933, inclusive." R. 428; 84 F. Supp. 918, 938.

[29] R. 431-432.

[30] Brief for The First National Bank, p. 15.

[31] Id. 15-55.

trustee *pendente lite*.[32] The court held as a matter of Illinois law that upon consolidation the resulting corporation automatically succeeds to the trusteeships previously held by the constituent corporations.[33] Since Otto Young was presumed to know this rule of Illinois law, and consequently to have appointed not only the First Trust but also its successors by consolidation, the court also concluded that neither consolidation was a "refusal to further act as trustee" within the meaning of his will. These conclusions are not challenged by plaintiff in her petition for certiorari (except, of course, by her rather obvious distortions of the facts under "Matter Involved").

The petition for certiorari questions the *validity* of the 1933 consolidation. The Court of Appeals did not pass on this question. It stated:

> "No one questions the validity of either of the consolidations or that all assets belonging to the trust estate did in fact pass in each instance to the successor consolidated corporation." [34]

The Court of Appeals did, however, devote three paragraphs to a consideration of the *effect* of the 1933 consolidation.[35] In the first paragraph it quoted at length from the McFadden Act. In the second it reviewed pertinent Illinois authorities holding that the McFadden Act is operative in Illinois. And in the third paragraph the court held that the 1933 consolidation had the effect prescribed by the statute.

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[32] R. 495.

[33] R. 488-495. The Supreme Court of Illinois expressly so held in **Chicago Title & Trust Co. v. Zinser**, 264 Ill. 31 (1914).

[34] R. 489; 179 F. 2d 347, 351.

[35] R. 493-495; 179 F. 2d 347, 353-354.

Thus the Court of Appeals stated that no one questioned the *validity* of either consolidation; held as a matter of Illinois law that the 1929 consolidation had the *effect* of transferring the trusteeship without the necessity of court intervention; and further held that the Federal statutory provision that the 1933 consolidation should have the same effect as the 1929 consolidation was not in contravention of Illinois law.

Plaintiff petitioned for rehearing, contending in Part VI of her Petition that the Court of Appeals "committed a grave oversight in concluding that the validity of the merger between First Union and First National was unchallenged."[36] She first asserted that the question had been raised in the District Court. The record flatly contradicted this assertion.[37] She also quoted at length from the brief filed by Mr. Sullivan in the Court of Appeals. Mr. Sullivan's brief had attacked the validity of the 1933 consolidation at some length. Since, however, Mr. Sullivan was not a party, but was merely seeking to sustain an appointment superseded by the appeal, it may be inferred that the court intentionally disregarded his brief. The petition for rehearing was denied without opinion.[38]

The petition for certiorari is filed on behalf of plaintiff and also Mr. Sullivan. It is respectfully suggested that Mr. Sullivan has no standing before this Court, and that plaintiff cannot lend color to her claim that the ques-

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[36] R. 545.

[37] Plaintiff's assertion was supposedly based on the portions of the record at R. 178-183, 398-399, and 423-434. These record references are analyzed in this respondent's Reply Brief in the Court of Appeals at pp. 19-22.

[38] R. 643.

tion here presented was properly raised below by joining him as a petitioner for review of a judgment to which he is not a party.[39]

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[39] The following statement by the Supreme Court of California in **People v. Union Building & Loan Assn.**, 59 Pac. 692 is directly applicable here:

> "O'Neil having no other relation to the case than that of receiver, an officer of the court created by its judgment from which these appeals were taken, has no standing or relation to the case which would authorize him to petition the court for a rehearing, or even to file a brief therein, except as an amicus curiae. In re Pina's Estate, 112 Cal. 14, 44 Pac. 332. He had no right of appeal. He was not a party aggrieved by the judgment from which the appeal was taken, and could not have taken an appeal, nor did the service upon him of the notice of appeal give him any standing in this court. He was not a party to the litigation, and had no interest in behalf of or against either party thereto. The only interest he has is that of retaining an office to which he was appointed by the court by its final judgment in a cause litigated by other parties."

It has long been settled in the federal courts that one who is not a party to a judgment has no right to participate in an appeal therefrom. See **Ex Parte Leaf Tobacco Board Of Trade**, 222 U. S. 578, 581, and cases cited.

## ARGUMENT.

### I. Plaintiff's Petition assumes the answer to a question of Illinois law which has been decided adversely to her assumption.

Plaintiff assumes—and this assumption is the crux of her petition—that Illinois has not consented to the operation of the McFadden Act in this State. On the basis of this assumption plaintiff seeks to present certain federal questions to this Court. But this case does not present those questions because plaintiff's basic assumption is invalid. We shall first demonstrate the invalidity of the assumption and then comment specifically on each of the so-called questions presented.

#### A. The State of Illinois has Consented to the Consolidation of Illinois and National Banks.

Ever since 1888 Section 12 of the Illinois Banking Act has authorized the consolidation of an Illinois bank "with any other corporation having banking powers which may hereafter exist • • •" Ill. Rev. Stat. (1949) c. 16½ § 12. This broad language has been construed by the Illinois Appellate Court as giving consent by Illinois to the consolidation of a state and national bank. In holding invalid an attempt to effectuate such a consolidation prior to the enactment of the McFadden Act, the Illinois court recognized that the Illinois Banking Act authorizes state banks to consolidate with national banks. The court stated:

> "The Banking Act of this State, Cahill's St. ch. 16a, grants to State banks the right to consolidate with each other and also with a national bank upon complying with certain conditions." *McRoberts* v. *Minier*, 270 Ill. App. 1, p. 10.

This general statement of the policy of the State of Illinois has been held to be specifically applicable to the very consolidation belatedly attacked by plaintiff in this Court. The case of *The First National Bank of Chicago* v. *Lindberg et al.*, 293 Ill. App. 474; appeal denied, 293 Ill. App. xlv; cert. denied 305 U. S. 636 (1938), is a complete answer to plaintiff's petition.

**The Lindberg Case.**

In that case the First Union Trust & Savings Bank as trustee under a trust deed brought a bill to foreclose a mortgage on certain properties. While the case was pending, the trustee was consolidated with The First National Bank of Chicago (this respondent) in the transaction referred to herein as the "1933 consolidation." Subsequestly this respondent filed a supplemental bill alleging that it had become trustee by virtue of the consolidation and asking leave to be substituted as plaintiff.

Defendant O'Brien answered by denying the validity of the 1933 consolidation and hence denying respondent's status as trustee. With the issue thus joined, the chancellor specifically found that the 1933 consolidation was valid. As stated by the Illinois Appellate Court:

> "The master reported and the chancellor found and decreed that the First Union Trust & Savings Bank was lawfully and effectively consolidated with the First National Bank of Chicago, which thereby became successor trustee under the trust deed and owner and holder of $4,000 of the bonds secured by the trust deed." 293 Ill. App. 474, 476.

Defendant O'Brien appealed on the ground that the First Union Trust had no power to pass its trusteeship to this respondent by entering into the 1933 consolidation.

The Illinois Appellate Court stated the theory of his appeal to be:

> "• • • that the outstanding and controlling question in this case is as to the powers of the First Union Trust & Savings Bank, under the Illinois statutes, and whether the consolidation of these banks is legal." 293 Ill. App. 474, 478.

Appellant O'Brien made the same arguments and relied on the same authorities as plaintiff does here.[40] The affirmance of the decision of the trial court by the Illinois Appellate Court, in the face of the same arguments here presented, is necessarily controlling on the issue of state law presented to this Federal Court.

The Appellate Court held that the legality of the 1933 consolidation was not subject to collateral attack by a private litigant, but could only be questioned by the Attorney General of Illinois:

> "From the authorities on the question up to this point it is clear that there is but one way to test the question of the legality of the existence of a corporation and its powers, and that is by an action in the nature of *quo warranto,* which, in this State, must be instituted by the Attorney General of Illinois." 293 Ill. App. 474, 481.

The reasons for this conclusion are directly applicable here. For despite her suggestion that she seeks to vindicate a "vital interest" of the State of Illinois (Pet. 12), plaintiff in the present case attacks the 1933 consolidation solely for the purpose of imposing an unconscionable

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[40] See O'Brien's Petition for Certiorari, No. 356, O.T. 1938, filed in this Court on Sept. 16, 1938. Note also the Illinois Appellate Court's long quotation from **Hopkins Fed. Savings & Loan Assn. v. Cleary, 296 U. S. 315 (1935).** (See 293 Ill. App. at 482-484). O'Brien, like plaintiff here, obviously relied heavily on the **Hopkins** case.

liability on respondent bank. She seeks private gain on purely technical grounds without regard for the interests of the State of Illinois. There have been 23 consolidations of Illinois banks with National banks under the McFadden Act.[41] All 23 would be invalidated by an acceptance of plaintiff's contention. There are sound considerations of policy for the Illinois court's conclusion "that the proper procedure would be for the Attorney General of the United States, or the Attorney General of this State to question the legality of the consolidation that took place when the banks were merged." 293 Ill. App. 474, 484-485.

Furthermore, the Illinois Appellate Court in the *Lindberg* case squarely held the McFadden Act to be operative in Illinois.[42] The Illinois court stated:

> "It does not appear from anything called to our attention that it was necessary to specifically authorize the consolidation of a State bank with a national bank to give effect to the powers and authorities conferred by the national act. Therefore, in the absence of a State statute prohibiting such consolidation, the national act applies and is the basis of the authority for the consolidation." 293 Ill. App. 474, 481.

As a matter of Illinois law the Illinois Appellate Court has held that it is not necessary for the Illinois Legislature to pass enabling legislation to specifically authorize

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[41] See Annual Report of the Comptroller of the Currency (1928), pp. 233-234; Id. (1929) pp. 246-247; Id. (1930), pp. 26-27; Id. (1931) pp. 193-194; Id. (1932) p. 145; Id. (1933) p. 156; Id. (1934), p. 188; Id. (1938), p. 207; Id. (1946), pp. 25-27.

[42] Plaintiff concedes that the court in the **Lindberg** case "held that the McFadden Act authorized the consolidation upon which the First National Bank's status as substituted plaintiff depended." (Pet. 34-35)

consolidations under the McFadden Act. The Illinois court has declared the policy of the State to accept the Federal statute as sufficient statutory authority for such consolidations. This important statement of policy was implicitly adopted by the Illinois Supreme Court when, without opinion, it denied O'Brien's petition for leave to appeal to that court. (293 Ill. App. xlv)

After the decision of the Illinois Supreme Court, defendant O'Brien sought a writ of certiorari from this Court. See No. 356, O.T. 1938. An examination of that petition reveals a striking similarity to the petition filed herein. Certiorari was denied. 305 U. S. 636 (1938).

**The Illinois Attorney General.**

Since the *Lindberg* case indicates that the Illinois Attorney General is the only party who may question the validity of the 1933 consolidation, it is appropriate to refer to his officially reported opinion on this issue. In response to an inquiry by the Illinois Auditor of Public Accounts he rendered an opinion which concluded with the following paragraph:

> "In view of the above, I am of the opinion that a bank organized under the laws of the State of Illinois may legally be consolidated with a national bank, the consolidated entity coming under the jurisdiction of the National Banking Act, and that by such consolidation the constituent corporations by operation of law cease to exist and the new corporation accedes to all the rights, property, franchise and interest, including the right of succession as trustee, executor or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by the constituent banks." Illinois Attorney General's Report and Opinions, 1927, 316, 319.

Relying on this opinion by the chief legal officer of the State, the Auditor of Public Accounts has subsequently approved of 23 consolidations of Illinois banks with national banks.[43] For 23 years the Executive branch of the State Government has followed the policy expressed by the courts in the *Lindberg* and *McRoberts* cases.

The silence of the Illinois General Assembly in the face of this consistent administrative and judicial interpretation of the Illinois statute of 1888 and of the policy of the State since 1927 signifies legislative approval of the operation of the McFadden Act in Illinois. To paraphrase Mr. Justice Cardozo's language in *Hopkins Fed. Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 343 (1935): The time has gone by for the State of Illinois to vindicate her majesty. Not merely by acquiescence, but by substantial affirmative conduct, Illinois has consented to consolidations pursuant to the McFadden Act.

**The Hopkins Case.**

Indeed, the *Hopkins* case, on which plaintiff places her principal reliance, is itself a sufficient answer to her petition. There the Court held that the power of Congress was not competent to authorize the conversion of a Wisconsin building and loan association into a federal association "against the protest of Wisconsin." 296 U. S. at 343. Since Illinois has not protested the 1933 consolidation, this holding is not material here. Instead, the significance of the *Hopkins* opinion is the Court's explanation of why *Casey* v. *Galli*, 94 U. S. 673 (1876) was correctly decided.

Speaking for a unanimous Court, Justice Cardozo set out the facts of the *Galli* case in some detail. 296 U. S.

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[43] See note 41, supra.

at 341-343. In that case a private litigant challenged the validity of the conversion of a Louisiana bank into a national bank. "The state did not oppose the conversion, though it was not shown to have consented. The reorganized corporation did business for more than two years, when it failed and a receiver was appointed by the Comptroller of the Currency." *Id.* 341-342. In subsequent litigation between the receiver and a shareholder, the latter contended that the conversion of the Louisiana bank into a national bank was void for want of authority from Louisiana.

The Court rejected this contention on two independent grounds which Justice Cardozo stated inversely to the order in which they appeared in the *Galli* opinion.

> "Thus stated they are these: (a) The defendant was estopped from contesting the validity of the change after standing by for over two years without making his objection known; and (b) apart from any estoppel, 'no authority from the State was necessary to enable the bank so to change its organization.'" *Id.* 342.

Justice Cardozo then noted that the case did not present a constitutional question. The validity of the Federal statute was taken for granted, inasmuch as the State of Louisiana, as well as the private litigant, had acquiesced in the conversion.

> "The assumption was one that could hardly be avoided when the controversy was viewed in the setting of the facts. Louisiana, like the defendant shareholder, had apparently acquiesced in the attempt of the central government to take over the state banks. The time had gone by to vindicate her majesty. What she might have done if she had been vigilant is a question not before us." *Id.* 343.

Thus the basis of the *Galli* decision as explained by Justice Cardozo was the fact that for over two years no

objection had been raised to the conversion. In view of this passage of time, the Court properly held (a) that the private litigant was estopped, and (b) that "no authority from the State was necessary to enable the bank so to change its organization."

Justice Cardozo's reasoning applies *a fortiori* to the case at bar. In the *Galli* case the State had neither opposed nor consented to the conversion. Here the State has affirmatively consented to 23 McFadden Act consolidations, including the particular transaction involved in the instant case. There, after "more than two years," the time had gone by for Louisiana to vindicate her majesty. Here, some 17 years have elapsed since the 1933 consolidation, and 23 years have passed since Illinois first consented to the consolidation of Illinois banks with national banks under the McFadden Act.[4] Certainly, when Illinois permits no one but the Attorney General to vindicate her majesty, this Federal Court will not entertain this belated attack on the 1933 consolidation by a private litigant. It is far too late for even the Attorney General to question its validity. As for plaintiff, she is not only too late; she never had any standing to raise this question at any time.

**B. Plaintiff's so-called "Questions Presented" may be answered summarily.**

**Question 1.**

Plaintiff first asks whether the McFadden Act is to be construed as conferring powers upon State banks.

If she is asking whether an Illinois Court should hold that an Illinois corporation has the power to consolidate with a national bank, she is asking a question of Illinois

[4] See Illinois Attorney General's Report and Opinions, 1927, 316, supra, p. 18.

law which has been answered in the affirmative by the Illinois courts. This answer presents no federal question, for the Illinois courts are certainly free to decide whether a consolidation pursuant to the McFadden Act is *ultra vires* an Illinois corporation.

If, on the other hand, she is asking whether a federal court should hold that a state bank has such power, the answer depends upon the law in the state in question. The Illinois answer to this question is binding on the federal courts in this case.

As subsidiary points under her first question, plaintiff suggests that the Federal statute is unconstitutional because it trespasses upon an exclusive domain of the State. But Illinois has consented to the so-called trespass. Clearly, therefore, no question arises under the Tenth Amendment.[45]

**Question 2.**

Plaintiff next asks whether the McFadden Act is to be construed to modify judicial constructions of State statutes.

The answer is quite obviously in the negative. The Federal Government has no power to tell an Illinois court what an Illinois statute means. Similarly, neither the Federal Constitution nor the McFadden Act requires Illinois to manifest its consent to McFadden Act consolida-

[45] If the Federal Act is inoperative even though Illinois has consented to its operation in this State, it must follow that every McFadden Act consolidation throughout the country is void. A constitutional question affecting the public interest to this extent certainly should have been raised at an earlier stage of the litigation. It was not raised below, as is evident from the fact that the Attorney General of the United States received no notice of any attack on the validity of the Federal statute. See infra, pp. 28-29.

tions by a specific enabling act passed after 1927. There is no Federal rule of law which prevents Illinois from expressing its consent through judicial construction of prior legislation, judicial interpretation of State policy, consistent executive action, or long-continued legislative acquiescence.[46] Illinois has manifested its consent in each of these several ways.

**Question 3.**

Thirdly, plaintiff asks whether state law controls in determining whether a consolidation under the McFadden Act is "in contravention of the law of the state."

The answer is quite obviously in the affirmative. The question is definitely one of state law and it has been answered in Illinois by the Illinois courts.

Plaintiff argues, however, that the Illinois courts answered this question incorrectly because a McFadden Act consolidation is really a merger which is not authorized (and hence is forbidden) by Illinois law. The gist of the argument is that Illinois could properly consent to a consolidation of a state and national bank if the consolidation terminated the technical corporate existence of the consolidating banks, but that she should not consent to the consolidation if the constituents survive. There are three short answers to this argument.

First, it is not for this Court to decide whether, as a matter of state law, Illinois should have consented to consolidations under the federal statute. The important thing is that the State has in fact given its consent.

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[46] Plaintiff has artfully concealed the real thrust of her argument. On the surface she purports to be protecting a "vital interest" of the State. In final analysis, however, she is contending that Federal law forbids the State to consent to consolidations of state and national banks in any manner but one, viz., by a specific enabling act.

Second, no policy of the State is contravened by prescribing that in a technical sense the corporate existence of the Illinois bank survives. The practical and substantive consequences of a McFadden Act consolidation are the same as the consequences of a consolidation of two Illinois banks.[47] Under Illinois law the Otto Young trusteeship automatically survived the 1929 consolidation; under both Illinois law and Federal law the same consequence ensued from the 1933 consolidation. It does not appear that Illinois attaches any real significance to the effect of the consolidation on the technical existence of the constituents.[48]

Third, even if it be assumed that a particular consequence of a McFadden Act consolidation is contrary to Illinois law, it does not follow that the consolidation itself is invalid. The validity of the consolidation in *Ex Parte Worcester National Bank,* 279 U. S. 347 (1929) was sustained even though one of the consequences prescribed by the McFadden Act was forbidden by local law. That case squarely holds that the Federal statute applies to the

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[47] The Illinois Banking Act expressly provides that a consolidation shall not affect "the rights of persons in any particular." Ill. Rev. Stat. ch. 16½ § 12. See **Albers v. McNichols,** 301 Ill. App. 551, 558 (1939); **Chicago Title & Trust Co. v. Zinser,** 264 Ill. 31 (1914).

[48] Compare the following statement by the Illinois Supreme Court with plaintiff's argument:

> "Much is said in the argument about the terms 'merger' and 'consolidation', and distinctions are sought to be drawn between the two forms of contract. We do not attach great importance to this line of argument. While there appears to be a distinction recognized by most of the authorities between a 'merger,' strictly speaking, and a 'consolidation,' still the terms are not always used with strict accuracy. Besides, the agreement under consideration employs both terms, so that the true intent of the agreement cannot be determined by recourse to the dictionaries." **C. & E. I. R. R. Co. v. Doyle,** 256 Ill. 514, 522, (1912).

extent that it is not contrary to state law. And it is manifest that the provision for technical survival of the constituent corporate entities is severable from the portion of the statute authorizing the consolidation itself, for it was not included in the statute as originally enacted in 1927 (44 Stat. 1224-1226). The question whether Illinois law authorizes this particular technical consequence, has no bearing on the question of the validity of the 1933 consolidation itself.

**Question 4.**

Finally, plaintiff asks whether any one is denied due process of law by the application of the presumption expressed in *Chicago Title & Trust Co.* v. *Zinser,* 264 Ill. 31 (1914) to the 1933 consolidation.

In the *Zinser* case the Supreme Court of Illinois held that a testator who appoints a corporate fiduciary is deemed to have contemplated the consolidation of the appointed trustee "with any other corporation then existing or that might thereafter be organized," and to have intended the successor corporation to execute his trust. (See 264 Ill. at 35-36.) The basis for this presumption is found in the provision of the Illinois Banking Act which authorizes the consolidation of Illinois banking corporations "with any other corporation having banking powers which may hereafter exist * * *." This provision has been effective continuously since 1888; specifically it was effective in 1905 when Otto Young executed his Will.[49]

The *Zinser* presumption had its source in an Illinois statutory provision that was in effect at the time of Otto Young's death. The basis of this presumption is not found in "Federal statutes enacted after the testator's death"

[49] See Chap. 16a, Sec. 12, Ill. Rev. Stats., 1905.

as plaintiff implies (Pet. 22). As a matter of Illinois law, Otto Young's presumed intent broadly encompassed any lawful consolidation of his appointed trustee. In the instant case this presumption applies to both the 1929 consolidation and the 1933 consolidation. As to the latter, the effect of the presumption is identical with the effect prescribed by the McFadden Act, namely, to transfer by operation of law the Otto Young trusteeship to the consolidated bank.

This presumption is entirely reasonable and has been accepted in many states without, as far as this respondent can determine, ever having been questioned on constitutional grounds.[50] Certainly it is not so unreasonable and arbitrary as to deprive anyone of due process of law.

## II. The issue of validity of the 1933 consolidation was not properly raised below.

In the District Court plaintiff not only failed to raise the issue here presented,[51] but even relied on the 1933 consolidation as a basis for imposing liability on this respondent for four years prior to 1933.[52] In the Court of Appeals plaintiff sought to raise the question of validity by a petition for rehearing in which she incorporated a

---

[50] See e.g., the following cases applying the Zinser rule to consolidations occurring after the death of the testator: **Adams v. Atlantic Natl. Bank**, 155 So. 648 (Fla., 1934); **Citizens and Southern Natl. Bank v. Connor**, 11 S.E. 2d (S. Car., 1940); **Mercantile Trust Co. v. San Joaquin Agricultural Corp.**, 265 Pac. 583 (Calif. 1928); Cf. **First Natl. Bank v. Harry E. Chapman Co.**, 22 S.W. (2d) 245 (Tenn. 1929).

[51] If by way of reply, anyone should contend that an attack on the validity of the 1933 consolidation was made in the District Court, it is respectfully requested that this Court refer to pages 19-22 of the Reply Brief filed by this respondent in the Court of Appeals where such a representation to the Court of Appeals is analyzed.

[52] R. 428.

long quotation from the brief filed by Mr. Sullivan.[53] Presumably this quotation stood on the same footing as Mr. Sullivan's original brief which was apparently ignored by the Court of Appeals because Mr. Sullivan had no standing in the cause. The petition did not advance any arguments which could not have been raised at an earlier stage of the case.

In this Court plaintiff tries to create the impression that the issue was properly raised below by setting out in an Appendix portions of the briefs filed by this respondent in the Court of Appeals.[54] In its Reply Brief respondent met on their merits the arguments advanced by Mr. Sullivan,[55] but only after pointing out to the court that the issue was not properly before it.[56] In this connection it is of interest that plaintiff lodged with this Court only this respondent's briefs below; she neglected to lodge her own briefs with this Court. Since, however, respondent has lodged here a complete set of the briefs in the court below, the Court will have the opportunity to search through plaintiff's briefs to ascertain the extent of her earlier attack on the validity of the 1933 consolidation.

The Court will search in vain for any citation of any of the following Supreme Court decisions, even though plaintiff now contends (in her "Reasons for Allowance

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[53] R. 547-555.

[54] App. 30-42.

[55] See Reply Brief of the First National Bank, 19-41 (Quoted in part in Plaintiff's Appendix, 34-42).

[56] Id. 2-6, 19-22 (This portion of the Reply Brief is omitted from Plaintiff's Appendix).

of Certiorari," Pet. 11-20) that the Court of Appeals failed to give proper effect to all of them:

> Ex Parte *Worcester National Bank*, 279 U. S. 347 (Pet. 13-16);
>
> *Davis* v. *Elmira Savings Bank*, 161 U. S. 75 (Pet. 12);
>
> *Knights of Pythias* v. *Meyer*, 265 U. S. 30 (Pet. 18);
>
> *Leffingwell* v. *Warren*, 2 Black 599 (Pet. 18);
>
> *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639 (Pet. 19).[17]

Similarly, in this Court plaintiff asserts that various constitutional questions are presented. None of these constitutional questions was raised in the court below. This is evident from the fact that, although plaintiff is attacking the constitutionality of an important federal statute, no notice of such attack was given to the Attorney General of the United States. Such notice is required by the Act of Congress of August 24, 1937, 50 Stat. 751; 28 U.S.C. § 2403. This requirement is mandatory. See *Garment Workers* v. *Donnelly Co.*, 304 U. S. 243, 249 (1938).

Plaintiff's failure to make her present attack on the validity of the 1933 consolidation at an earlier stage of the case is itself a sufficient reason for denying certiorari. This Court has summarized its practice as follows:

> "This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U. S. 195. There are specially cogent

[17] Nor did Mr. Sullivan cite any of these cases, even though he volunteered a brief attacking the 1933 consolidation in that court.

reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government." *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225 (1927). See also *Duignan* v. *United States*, 274 U. S. 195 (1927) and cases cited at p. 200.

**III. Whether a consolidation is in contravention of the law of a State is a question of State law.**

This Court has consistently denied petitions for certiorari presenting the question whether a McFadden Act consolidation is in contravention of the law of a particular state. *First National Bank* v. *Lindberg*, 293 Ill. App. 474, cert. denied 305 U. S. 636 (1938), rehearing denied 305 U. S. 671 (1938); in re *Watkins Estate*, 113 Vt. 126, cert. denied 319 U. S. 757 (1943); *Stevens* v. *First National Bank and Trust Co.*, 173 Ga. 332, cert. denied 284 U. S. 684 (1932); *Hofheimer* v. *Seaboard Citizens Natl. Bank of Norfolk*, 154 Va. 896, cert. denied 283 U. S. 855 (1931). An appropriate reason for denying the petitions for certiorari in every one of these cases, was that, in final analysis, the petitioner was asking the Court to review a question of State law. That reason applies with particular force to the instant petition.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

## No. 789

MARGARET DE KORWIN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF JOSEPH MARIA DE KORWIN, DECEASED, AND JOHN EDWARD SULLIVAN,

*Petitioners,*

*vs.*

THE FIRST NATIONAL BANK OF CHICAGO, ET AL.,

*Respondents.*

## BRIEF OF RESPONDENTS, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, CATHERINE OTTOLIE YOUNG BREWSTER COCHRAN, ANN ELIZABETH YOUNG SAGE, NANCY YOUNG SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG ALEXANDER, AND JOHN WILLIAM YOUNG MARTIN, IN OPPOSITION TO PETITION FOR CERTIORARI OF MARGARET de KORWIN.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

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**No. 789.**

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MARGARET DE KORWIN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF JOSEPH MARIA DE KORWIN, DECEASED, AND JOHN EDWARD SULLIVAN,

*Petitioners,*

*vs.*

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*Respondents.*

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## BRIEF OF RESPONDENTS, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, CATHERINE OTTOLIE YOUNG BREWSTER COCHRAN, ANN ELIZABETH YOUNG SAGE, NANCY YOUNG SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG ALEXANDER, AND JOHN WILLIAM YOUNG MARTIN, IN OPPOSITION TO PETITION FOR CERTIORARI OF MARGARET de KORWIN.

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MAY IT PLEASE THE COURT:

This brief is filed in behalf of Otto Young's sole surviving daughter, Mrs. Pratt, and seven of his grandchildren, respondents herein, and petitioners in Nos. 771, 772, and 773.

The Court's attention is respectfully directed to the following facts:

(1) Under the Will of Otto Young, Mrs. Pratt is the sole surviving beneficiary authorized to participate in the appointment of a successor trustee in the event of a vacancy in the trusteeship. (R. 157, 318; see family tree attached to petition in Nos. 771-773.) In the District Court Mrs. Pratt testified as follows:

> "Q. At the time that these consolidations occurred, two of your sisters were alive, Selma Cecile and Laura were alive. First of all, did you ever make any suggestion to anyone, to them or to the bank or anyone else, of the appointment of a new trustee at that time?
>
> "Mr. Aiken: Excuse me, Mr. Dammann. You mean her sister Catherine. Laura was dead at that time."
>
> By Mr. Dammann:
>
> "Q. The three of you alive were Selma Cecile, Catherine and yourself?
>
> "A. Yes.
>
> "Q. And my question is whether at that time or any time you ever made any suggestion to them, or they to you, that there should be a new trustee appointed?
>
> "A. No, at no time.
>
> "Q. Mrs. Pratt, are you satisfied with the First National Bank & Trust Company acting as trustee in this estate?
>
> "Mr. Aiken: Objection, your Honor.
>
> "The Court: Well, we will make the same ruling."
>
> By the Witness:
>
> "A. Yes, I am."
>
> By Mr. Dammann:
>
> "Q. Do you wish it to continue to act as trustee?
>
> "A. What did you say?
>
> "Q. Do you wish it to continue to act as trustee?
>
> "A. I do." (R. 319-320.)

(2) All of these respondent-beneficiaries advised the District Court and the Court of Appeals that the trustee had rendered periodic statements of account to the income

beneficiaries; that they knew of no charge, nor any basis for a charge, of maladministration of the trust; that they considered plaintiff's position completely technical; and that they saw no reason why the trustee, who has managed these extensive properties so long, and so well, should not continue in the trusteeship. (R. 391; Brief in Court of Appeals, p. 13.)

In this Court these respondents desire merely to reaffirm the position which they took in the District Court and in the Court of Appeals. Although an accounting from The First National Bank on principles of *de son tort* liability might under the language of some decisions yield a substantial recovery to all the beneficiaries including these respondents, since all beneficiaries must be treated alike; nevertheless, these respondents wish to emphasize that any surcharge on technical principles of liability appears to them to be most unconscionable.

It is respectfully submitted that the petition for certiorari in No. 789 should be denied.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

No. 790

GWENDOLYN YOUNG HEYWORTH KOCH,
*Petitioner,*

*vs.*

MARGARET DE KORWIN, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA DE KORWIN, DECEASED,
*Respondents*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

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No. .....

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GWENDOLYN YOUNG HEYWORTH KOCH,
*Petitioner,*

*vs.*

MARGARET DE KORWIN, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA DE KORWIN, DECEASED,
*Respondents*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

*To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petition of Gwendolyn Young Heyworth Koch, by her attorneys, respectfully shows:

There are involved here important matters of federal jurisdiction in which the decision below is contrary to decisions of this Court and in other circuits. The Court of Appeals has affirmed a decree which extends its benefits to absent parties (whose presence would defeat diversity jurisdiction) contrary to the principle of mutuality. It also has apparently determined that absence of indis-

pensable parties is cured by a decision favorable to the absent parties. In any view the action of the Court of Appeals extends federal jurisdiction beyond previous limits. The decision in particular is contrary to the recent decision in the Fifth Circuit in *Young* v. *Powell*, Petition for Certiorari filed March 17, 1950, No. 688, as well as prior decisions in that Circuit.

There is also involved the question whether the Court of Appeals properly decided an important question of local law. Petitioner submits that it is manifest from a consideration of the majority opinion below, together with a few of the cases cited in the opinion, that the majority misunderstood and unintentionally repudiated a certain important and well settled local rule of construction in the determination of whether remainder interests under a will were vested or contingent on survival, with the result that a breach now exists between the law as applied in the state and federal courts.

Petitioner calls attention to the fact that a petition for certiorari has been filed by eight other defendants, also beneficiaries of the trust under the will of Otto Young (Case Nos. 771, 772, 773) and the record in that case is the basis for the present petition. Petitioner fully subscribes to the position there taken, in addition to urging the matters hereinafter set forth.

* * * * *

To understand what is involved under the jurisdictional point a brief review of the litigation and parties is necessary.

The original plaintiff was Joseph Maria De Korwin, otherwise known as Count Korwin-Sokolowski (R. 2), a citizen of Poland. He was the second husband of Selma Cecile, one of the four daughters of Otto Young who died in 1906 (R. 276) leaving a will disposing of an estate of

real and personal property located in Illinois which is now valued for the purposes of this case at approximately $35,000,000 (R. 303-4).

DeKorwin and Selma Cecile were married in 1911 and divorced in 1921. There was one child of this marriage, Stanislaus Stephen deKorwin, sometimes known as Stanley Young, who, in 1940, died domiciled in Illinois, intestate and without issue, leaving as his three heirs (1) his father, the original plaintiff, (2) his half-sister, Gwendolyn Young Heyworth Koch (this petitioner), and (3) his widow, Ruth Jacobi Young.

Stanley Young was the second grandchild of Otto Young to die. In 1936 Otto Young Heyworth, a child of Selma Cecile by her first marriage, had also died domiciled in Illinois, intestate and without issue, leaving as his five heirs (1) his father, Lawrence Heyworth, (2) his sister, your petitioner, (3) a half-brother, Lawrence Heyworth, Jr., (4) his half-brother, Stanley Young, referred to in the next preceding paragraph, and (5) his widow, Evelyn Heyworth (R. 277).

During the present litigation Count deKorwin died and the suit was continued by his widow, Margaret deKorwin, as executrix and individually. She is the respondent to the present petition, but for convenience reference will be made throughout to the original plaintiff.

The plaintiff's initial complaint sought a share of the Otto Young estate by way of total intestacy as an heir of an heir by attacking the will as violating the rule against perpetuities. It also presented two alternative claims to a smaller share based on a claimed partial intestacy and on a construction of the gift in remainder to issue of grandchildren who might have died as a gift to heirs. The original and the several amended complaints also challenged, as a matter of construction of the will and the application

of state and federal statutes, the trusteeship of The First National Bank of Chicago (156 F. 2d 858, 859, 860; R. 441; record in this Court in *First National Bank* v. *deKorwin*, October term 1946 No. 696, pages 3-21).*

Jurisdiction under the original complaint was challenged on the ground that, upon a proper realignment of the parties, Illinois citizens named as defendants, being the surviving heirs of Stanley Young and Otto Young Heyworth other than your petitioner, became aligned on the side of the plaintiff and opposed to other Illinois citizens, thereby destroying diversity of citizenship jurisdiction. The plaintiff thereupon moved to dismiss these parties. The District Court denied the motion and dismissed the cause for lack of jurisdiction. The Court of Appeals reversed, holding that the persons in question were not indispensable, for the reason that by limiting the relief granted a decree could be entered upon the original complaint which would not affect the rights of the absentees (156 F. 2d 858).

Petition for writ of certiorari to this Court from the first decision of the Court of Appeals in the instant case was denied, 329 U. S. 795.

Thereafter the plaintiff with leave of court filed a second amended complaint and proceeded to trial upon an entirely different theory in attempting to establish an interest in the estate (R. 298). Instead of seeking to recover a portion of the corpus of the trust as intestate property, plaintiff now claimed that under a proper construction of the will his deceased intestate son was given a vested remainder in fee in the corpus of the trust along with all the other grandchildren (eighteen in number in the ag-

* The original complaint was incorporated in the unprinted record, certified to the Court of Appeals, but was not included in the printed record because covered by stipulation of the parties permitting reference to such prior record without reprinting, R. 480-481.

gregate) and that the plaintiff as an heir of his son had inherited a portion of that interest (R. 132-150).

The answers of the trustee and the adult defendants (all the living grandchildren) put this claim in issue, contending that under a proper construction of Otto Young's will the remainders to grandchildren were not vested but contingent upon the survival of such grandchildren to the termination of the trust (R. 186, 195, 212). Petitioner opposed the plaintiff's contention. Although she was an heir of both deceased grandchildren, the setting up of two additional shares would also have reduced somewhat her own share as a grandchild.

The plaintiff in his second amended complaint did not join either as plaintiffs or defendants those citizens of Illinois (See *deKorwin* v. *First National Bank,* 156 F. 2d 858, 860) who had been dismissed out after the first decision of the Court of Appeals, and who if they had remained in the case and had been properly aligned would have been on the side of the plaintiff (R. 263, 264, 277), viz.: four of the persons hereinbefore named as heirs of Stanley Young and Otto Young Heyworth (*i. e.,* Ruth Jacobi Young, Evelyn Heyworth, Lawrence Heyworth, and Lawrence Heyworth, Jr.) as well as Metropolitan Trust Company of Chicago, present administrator of the estate of Stanley Young, and The Northern Trust Company of Chicago, the administrator of the estate of Otto Young Heyworth (R. 263).

The several answers preserved the question of lack of jurisdiction (R. 186, 200, 212) but the District Court proceeded to decide the case on the merits. The decree made a general determination that the remainders were vested and that the share of any grandchild who died without issue before the termination of the trust is a transmissible interest descending to his heirs, devisees and legatees. The decree was not limited to the plaintiff or

without prejudice to the position of absent parties but declared that they had interests in the trust and appeared even to contemplate a distribution to them under the retained jurisdiction of the court (R. 399, 431). Salient portions of the decree are quoted *infra*.

The District Court also held that the trustee acting under the will, The First National Bank of Chicago, which had succeeded to the trusteeship following a consolidation in 1929 of two state banks and a consolidation in 1933 with a national bank, had not, under the Court's construction of the will, properly succeeded to the trusteeship; held that the trusteeship was vacant; ordered an accounting; and retained jurisdiction to appoint a successor trustee (R. 422-430).

The trustee and all of the adult defendants appealed, assigning as error, among others, the lack of jurisdiction and omission of indispensable parties, and included the point in their briefs (R. 448, 455, 465).

On appeal the Court of Appeals unanimously reversed the decree on the trusteeship point but, with one Judge dissenting, affirmed the remainder of the decree. While it did not comment on the jurisdictional question, it necessarily held that the District Court had jurisdiction and that the decree reviewed was proper within the principles laid down in the opinion on the first appeal.

It is petitioner's position that the above named persons who were dismissed as defendants after the first appeal, are indispensable parties under the issues finally submitted to the court and that the decree, which declared the rights of absent persons similarly situated to the plaintiff, could not do so without those persons being parties even if they were not indispensable to the issues.

It is contended that in affirming the decree the Court of Appeals for the Seventh Circuit decided important ques-

tions of federal jurisdiction contrary to decisions of this Court and in other circuits and contrary to the law of Illinois; and that in the decision on the merits the Court of Appeals decided an important issue of local law in a way in conflict with applicable local decisions.

## OPINIONS BELOW.

The opinion of Judge Igoe (R. 399) is reported 84 F. Supp. 918.

The opinion of the Court of Appeals (R. 484) is reported 179 F. 2d 347.

## STATEMENT AS TO THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, Act of June 25, 1948, Chapter 646, 62 Stat. * * *, 28 U. S. C. Section 1254 (1).

The decision of the Court of Appeals was rendered December 30, 1949 (R. 484).

Petition for rehearing duly filed was denied February 1, 1950 (R. 643).

## THE QUESTIONS PRESENTED.

1. Whether, in view of the general principle of mutuality in the estoppel of judgments, a Federal District Court can properly declare rights in absent parties who would not have been bound by an adverse decision (and whose presence would have destroyed diversity jurisdiction).

2. Whether in the federal courts a lack of indispensable parties (whose presence would defeat diversity jurisdiction) is cured by a decision on the merits favorable to the absentees.

3. Whether for purposes of diversity jurisdiction absent parties (whose presence would destroy the diversity) having the same interests as the plaintiff are indispensable where, among other things, (a) some of them are co-heirs with the plaintiff interested in a decedent's estate, and plaintiff asserts (in a suit against the trustee and beneficiaries of a trust in which the decedent was a beneficiary) that the decedent's estate owns a share of the trust corpus, subject to life estates, because decedent had a vested interest in the trust; (b) said vested interest is asserted under an interpretation of the trust instrument (a will) which will determine the character of the interests (as vested) of other beneficiaries, will establish interests in heirs of another deceased beneficiary, and will reduce the interests of living beneficiaries; and (c) plaintiff also asks to have the will construed to determine whether the acting trustee is entitled to continue as trustee.

4. Whether in holding the remainder interests of the grandchildren in the trust vested rather than contingent on survival, the Court of Appeals properly refused to apply a local rule of construction of future interests limitations which had been applied by the Illinois courts on three occasions and by the Court of Appeals itself on one prior occasion and had never previously been distinguished or refused application by either court.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The writ should be allowed for the following reasons, certain of which are stated more fully in the subsequent portion of the petition:

I. The decision of the Court of Appeals is in conflict with decisions of this Court and with decisions in other circuits (cited *infra*) in these several respects (and conflicts with the recent decision of the Fifth Circuit in *Young* v. *Powell*, petition filed March 17, 1950, No. 688, in all of the following respects):

(1) in approving a decree that purports to establish rights in absent parties who would not have been bound by an adverse decision (and whose presence would have destroyed diversity jurisdiction), following the decision of the Ninth Circuit in *Sadler* v. *Sadler*, 167 F. 2d 1 (1948), in violation of the long established principle of mutuality in the estoppel of judgments;

(2) in apparently adopting the similar notion, opposed to the principle of mutuality, that diversity jurisdiction depends on the decision on the merits and that lack of indispensable parties can be cured by a decision favorable to the absentees;

(3) in holding that absent parties having joint interests with plaintiff are not indispensable because their presence would defeat diversity jurisdiction where, among other things, some of them are co-heirs with plaintiff interested in the estate of a deceased trust beneficiary, a grandchild of the maker of the trust, and plaintiff asserts that the estate has an interest in the trust because all of the grandchildren of the decedent had vested rather than contingent interests in the trust, where the other absentees are heirs of another deceased grandchild, and where plaintiff also asserts that under a proper construction of the instrument of trust the acting trustee is not entitled to continue and is liable to the trust; and

(4) in deciding each of the above questions in a manner also contrary to local law.

II. The Court of Appeals has decided an important issue of local law in a way in conflict with applicable local decisions. The local rule is involved where there is a disposition of a future interest to remaindermen not described initially as survivors but so described in subsequent words providing for a substitutional gift to issue of a deceased remainderman, where the reference is to the share which the remainderman (parent) would have taken "if then living", or the like. The local rule is that these words are the equivalent of an initial gift to remaindermen "then living" and are an express provision for contingency making resort to other rules of construction or to inferences of intention unnecessary. The decision of the Court of Appeals refusing to apply the rule creates an important breach between the law in the state courts and in the federal courts and will unsettle many titles and previous dispositions. The fact that four cases have been appealed and decided in Illinois involving the rule since 1905 indicates that there are many other instances where litigation has so far been avoided because the rule was regarded as settled.

## I.

### THE COURT OF APPEALS HAS ATTEMPTED AN IMPORTANT AND FAR-REACHING EXTENSION OF DIVERSITY JURISDICTION IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

#### (a) The Importance of the Decision Below.

The prior decision of the Court of Appeals on the jurisdictional question which was involved at that time has received wide attention.* It is likely that the second deci-

* See for example Moore's Federal Practice 2d Ed. Sec. 19-08 note 16.

sion, being a sequel to the first, will have far-reaching effects. (Review is also necessary for the further conduct of this litigation and to prevent another appeal and petition on questions of federal jurisdiction.)

A simplified statement of the facts shows the peculiar result reached. Plaintiff claimed that a deceased beneficiary of a testamentary trust administered by an Illinois trustee had a vested interest in the trust property so that plaintiff, having an interest as heir in the estate of the beneficiary, was entitled to a share in the trust on its future termination and to a present accounting from the trustee. The deceased beneficiary was plaintiff's son who had died, while domiciled in Illinois, intestate and without issue but leaving surviving a widow and plaintiff. The widow was entitled under Illinois law to all of the personal property of decedent after claims of creditors and to one-half of the real estate (Ill. Rev. Stat., Chap. 3, Sec. 162). The presence in the suit of the widow or the administrator, being citizens of Illinois, would have defeated diversity jurisdiction. Over continuing objections of the defendants the District Court proceeded without them, construed the will, and decided not merely that the plaintiff had an interest, but that the *estate* of the deceased beneficiary and persons interested therein had an interest in the trust. The decree determined the rights of the widow and administrator and apparently invited them to come into court and obtain the benefit of the victory. There was in fact another beneficiary (Otto Young Heyworth) domiciled in Illinois who had died under identical circumstances, and the decree also extended the benefits and the invitation to other Illinois citizens interested in the estate of this second deceased beneficiary, none of whom were parties.

Thus the situation is presented of two or more persons having a common claim as co-heirs of a deceased beneficiary to ownership of an undivided share of a trust.

One sues to establish the share and the others stay on the sidelines. If the plaintiff loses, the absent coheirs are not bound but can bring the defendants into court a second time and try again. If the first plaintiff wins, there are basically two alternatives, assuming jurisdiction.

One is that the decree establishes rights in the absent plaintiffs. This is what the decree in the instant case provides. But a rule permitting such decrees is opposed to the rule of mutuality in the estoppel of judgments. It would make diversity jurisdiction the means whereby multiple plaintiffs have an unconscionable advantage over defendants (and without necessarily eliminating further litigation because the court is unable to decide questions existing between the plaintiffs). The defendant is required to win the case twice, if not more often, once in a federal and once in a state court, whereas one victory for the plaintiffs' side extends to all and the defendant has no second chance. A number of plaintiffs could agree to divide the costs and proceeds of several suits and could then sue one at a time in different courts until some one of them was successful.

The only other alternative, if jurisdiction must be assumed, is to stop with a decree that leaves untouched the interests of the absent plaintiffs. But this is impossible, as recognized in decisions holding that such interests are not separable. Such a decision, moreover, leaves the controversy in confusion. (For one thing there would usually be a serious question whether the decree is sufficiently limited. Further litigation over jurisdictional matters would be likely.) The plaintiff himself will need a division of the property and further relief in a state court. Such a decision does not even establish the character of the remainder interests of the defendant grandchildren for their own purposes or as between them and the trustee. The other plaintiffs will necessarily bring a subsequent suit or

suits in an attempt to duplicate the first plaintiff's success. An opposite result may possibly be reached, adding to the confusion. This is the consequence of a rule sustaining jurisdiction to enter *any* decree.

It also follows as an incident of the decision that if the District Court in this case had jurisdiction to enter any decree, the federal courts have quasi-probate jurisdiction in every case where a third person owes money or holds property belonging to an estate and there is at least one heir or legatee who is a citizen of a different state than the debtor. In fact, if local heirs can join in after the first decree in a suit against an administrator for an accounting and distribution the federal courts become courts of probate.

It also follows that the federal courts will be available on behalf of one of several persons to construe or set aside a contract, will, or trust instrument, leaving it in effect or with a different meaning as to the others. Apparently it can even be determined that one person is trustee as to some beneficiaries whereas there is another trustee of the same property as to others.

Yet the state courts here had jurisdiction to adjudicate the rights of all persons interested in the trust under the will and to give complete relief in one proceeding.

### (b) The Dilemma as to the Jurisdiction of the District Court.

In a suit such as this in an Illinois court all persons interested in the controversy on either side must be parties to the suit. *Riley* v. *Webb*, 272 Ill. 537. This is the usual state rule. The court can thus give complete relief and can establish rights in the property or *in rem* and not just between a plaintiff on one side and defendants on the other side. Where the court has jurisdiction of the prop-

erty, persons outside the jurisdiction can be notified and their rights determined. (Ill. Rev. St. Ch. 110, Sec. 138.)

Federal court decisions have made a distinction between the requirements of state and federal jurisdiction where there are persons whose presence would destroy the federal jurisdiction. It is said that such persons, while necessary parties, are not indispensable if the court can proceed without them. This is the substance of Rule 19(b).*** For this purpose an indispensable party is a person who has such an interest that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination will be wholly inconsistent with equity and good conscience. *Shields* v. *Barrow,* 17 How. (58 U. S.) 130.

Whether a determination of the rights of the plaintiff will affect the interests of absent plaintiffs depends on whether their interests are "separable." *Shields* v. *Barrow, supra.* The decisions establish that in some instances the interests of co-heirs are separable and in some they are not. If they are not separable, there is no jurisdiction to enter *any* decree.

If the interests are separable the decree itself must be explicitly limited so as to establish only the rights of plaintiffs actually before the court and must show on its face that the rights of absent plaintiffs are unaffected and must be established in another suit. *Waterman* v. *Canal-Louisiana Bank Company,* 215 U. S. 33.

Hence this dilemma is presented in cases such as the present. If the absent plaintiffs had interests which were not separable, they were indispensable parties. But even if they were dispensable the decree would have to provide that it was not a determination of the vested-contingent question in the case of absent parties. Such a decree would

*** The Rules of Civil Procedure do not extend or limit jurisdiction, Rule 82.

be self-contradictory because of the nature of plaintiff's claim and would leave the controversy in a condition inconsistent with equity and good conscience, so that for this reason the parties were indispensable, the interests were not separable, and the court was without jurisdiction.

Petitioner's position accordingly is basically that the interests were not separable, that an artificially limited decree is impossible or would be contrary to equity and good conscience, and that the District Court had no jurisdiction.

**(c) The Decision Affirms a Decree Which Purports to Establish Rights in Absent Parties Contrary to Decisions of This Court and in Other Circuits.**

The decision of the Court of Appeals affirming the decree on the vesting question gives relief to absent parties who would not have been bound by an adverse decision (and whose presence would defeat diversity of citizenship jurisdiction), contrary to the basic requirement of mutuality, which is both federal and Illinois law. *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111; *Riley* v. *Webb*, 272 Ill. 537, 538, 539; Freeman on Judgments (5 Ed.) Sec. 428; See Restatement of the Law of Judgments, Sec. 93 and 103.

A decree not only is not *res judicata* in favor of absent (and unrepresented) parties, but it must be expressly limited so as not to purport to adjudicate the rights of absent parties That the test of a decree is not what the decree can do but what it purports to do is apparent from the numerous statements in the federal decisions, in considering the possibility of an adverse decree, that it must not "injuriously affect" the rights of absent parties where it is, of course, clear that no decree could actually bind absentees. The decree must not be a cloud on the rights of absent parties nor a cloud on the rights of present

parties as against absent parties, whether the absentees are plaintiffs or defendants.

In the specific situation, among the various combinations, where the absent parties are plaintiffs and the decision is favorable, the precise question has been decided in conflict with the decision below by the 5th Circuit in the recent decision in *Young* v. *Powell*, 179 F. (2d) 147, Petition for Certiorari filed March 17, 1950, No. 688, discussed below.

The instant decision is also in conflict with *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33. There, in stating the distinction between necessary and indispensable parties, the Court said (p. 48):

> "• • • provided, in the case of necessary parties, their interests are such and so far separable from those of parties before the court, that the decree can be so shaped that the rights of those actually before the court may be determined without necessarily affecting other persons not within the jurisdiction."

Referring specifically to the relief which might be given there without affecting the interest of the absent party, Davis, the Court said:

> "If it finds the issue in favor of the complainant, it may proceed to determine the proportion in which the complainant and the Watermans are entitled to share, without prejudice to the rights of Davis. It may direct the retention of his share in the hands of the executors, to be adjudicated in some other suit, or may otherwise shape its relief so as to do justice to the parties before the court without affecting his interest."

In other words, the decree must explicitly limit its operation to the persons before the court and the decree itself must state that it is not determining the rights of absent parties.

The decree in the instant case contained the following provisions:

"* * * The gifts in remainder made by Otto Young in his last will and testament to his grandchildren are vested estates, * * * and the share in such testamentary trust estate of any grandchild who dies without issue before termination of the trust is a transmissible interest and descends to his heirs, devisees and legatees" (R. 430).

* * * * *

"* * * jurisdiction of this cause is expressly retained * * * to fix the amount of proportional contributions to plaintiff's counsel out of their remainders from such heirs, legatees and devisees of Otto Young's grandchildren dying without issue before termination of the trust as may accept the benefit of services rendered by plaintiff's counsel in creating and preserving such interests, either by applying for or by receiving their share in the vested estates herein established; and to appoint a permanent successor or successors in trust of said trust" (R. 432).

The instant decree nowhere contains any limiting language. It declares the rights of the absent plaintiffs and refers to plaintiff's counsel having "created and preserved" remainder interests in other heirs of deceased grandchildren. It even appears to invite the absent parties to come into court and claim the benefit of the decision. The decree contemplates retention of jurisdiction, perhaps for the purpose of ultimately decreeing a distribution to all beneficiaries including the absent parties.

Yet this is not an isolated departure from the rule of mutuality by the Court of Appeals for the 7th Circuit. A similar decree was approved in *Sadler* v. *Sadler,* 167 F. (2d) 1 (C. C. A. 9, 1948). This is closely related to the erroneous notion that a jurisdictional defect due to absence of parties is cured by a decision in favor of those parties.

The danger inherent in the rule put into effect by the Court of Appeals in affirming this portion of the decree is well stated in the recent decision of the Court of Appeals

for the 5th Circuit in *Young* v. *Powell*, 179 F. (2d) 147, Petition for Certiorari No. 688, filed March 17, 1950. Following its prior decision in *Calcote* v. *Texas-Pacific Coal & Oil Co.*, 157 F. (2d) 216 (Cert. den. 329 U. S. 728, 830), the Court said:

> "Such view would permit the continual harassment of the defendant by successive suits brought singly by interested parties, each in the interest of them all, for cancellation with no protection, in case the defendant wins, from successive suits by the others who had not been made parties, while in case he lost in the first suit, his complaint that he ought not to have suffered a judgment in favor of persons who were not sued, would be met by the cynical view, 'Well, those who ought to have been in the suit haven't suffered because their interests have prevailed, and having lost the suit, it doesn't lie in your mouth to complain that they got the benefit of a suit to which they were not made parties'."

The decree of the District Court involved in *Young* v. *Powell* and the decree in the instant case are substantially similar in all material respects and the decisions are in direct conflict. The facts are even similar on the question of indispensable parties. In both cases the suit was brought by a person interested in the estate of a decedent in order to realize an asset for the estate, and other parties interested in the estate (including the executor or administrator) whose presence would have destroyed the jurisdiction did not become parties. In *Young* v. *Powell* the assets claimed on behalf of the estate were the subject of certain *inter vivos* dispositions by the decedent which were to be set aside. In the instant case the asset was a portion of the corpus of a testamentary trust which was being held by the trustee under an interpretation of the will which excluded the claimant estate. In both cases the decree could have stated that it was only an adjudication of the issue for purposes of the actual plaintiff. Instead,

in *Young* v. *Powell* the decision was in favor of the estate and the defendant was ordered to pay to the estate for distribution in accordance with the will of the decedent and the court decreed that the real estate was part of the estate. Similarly, in the instant case the court decreed that the estate had an interest and that plaintiff had created interests for absent parties who might share in the relief upon a proper contribution to plaintiff's expenses and attorney's fees. (The court apparently had in mind an application of the Illinois law permitting the awarding of fees for attorneys for a plaintiff who brings a fund into court.)

**(d) In Holding That the Absent Parties-Plaintiff Were Not Indispensable the Decision Improperly Extends Diversity Jurisdiction Far Beyond Previous Limits.**

The decision of the Court of Appeals in sustaining the jurisdiction of the District Court in the absence of indispensable parties is in conflict with numerous decisions of this Court and in other circuits as shown hereafter. The decision violates the rule as to indispensable parties. It also violates the rule as to diversity of citizenship since there were indispensable parties interested as plaintiffs who were citizens of Illinois.

**The Decision May Be Taken as Holding That Lack of Jurisdiction Is Cured by a Decision Favorable to Absent Parties.**

In considering whether parties are indispensable, it must be assumed that the decision on the merits may be either way. The double tests stated in *Shields* v. *Barrow*, 17 How. (58 U. S.) 130, 139, that parties are indispensable if any decree will either affect their interests or leave the controversy in a condition contrary to equity and good conscience, must be applied both to a decision favorable to the plaintiff and one against the plaintiff. Lack of juris-

diction is not cured by a decision favorable to the absent parties because jurisdiction is by definition a condition precedent. *Young* v. *Powell, supra, Calcote* v. *Texas Pacific Co.*, 157 F. 2d 216 (C. C. A. 5th, 1946, cert. den. 329 U. S. 728, 830). See discussion of mutuality and authorities cited, *supra*.

Yet the decision of the Court of Appeals has the effect of announcing the contrary rule. The decision can only be rationalized on this ground since it is clear that there was no jurisdiction to construe the will against the absent interests.

**Whether Plaintiff's Interests Are Separable From Those of Absent Parties.**

If the interests are not separable the absent parties are indispensable and it is considered that any decree will affect the absent interests. It does not matter that the decree could explicitly state that it is only an adjudication with respect to the actual plaintiff. If this were an answer there would be no such thing as indispenable parties-plaintiff because any decree could provide that it was only a determination between present parties and did not affect absent parties. Where the decree of itself, if adverse, would be not merely a precedent* against the similar claim of absent plaintiffs but would cast a cloud on their title or claim, the plaintiff is not entitled to a self-contradictory decree. A contrary rule would breed litigation over the scope and interpretation of particular decrees.

Decisions involving heirs or distributees must be ana-

* Any decree in a case such as this would, of course, be much more than a precedent in the usual sense. It is a decision of the very issues before the court in a later suit. As a practical matter the positions of the parties to the second suit are seriously prejudiced and to say that their interests are not affected is to ignore the practical consequences.

lyzed to determine whether the claim of the plaintiff was individual or whether it was in effect a single claim of the estate or all of the heirs. There is an obvious difference between a claim of an heir against the administrator for distribution of his aliquot share, which may be called a one-stage case, and cases of a claim by an heir against a third person who owed money to the decedent or holds property said to belong to the decedent or his estate. This is a two-stage case. The rights of the heirs stem from the decedent and in substance are rights of the estate or derivative rights.

The three instances, *Horn* v. *Lockhart*, 17 Wall. (84 U. S.) 570, *Payne* v. *Hook*, 7 Wall. (74 U. S.) 425, and *Waterman* v. *Canal-Louisiana Bank Co., supra*, 215 U. S. 33, in which this Court has held the interests of heirs separable are all one-stage cases, or suits by an heir against the person administering the estate.

*Young* v. *Powell* is a two-stage case where an heir sued a third person said to have obtained gifts from the decedent by undue influence. (The third person merely happened to be the same individual as the administrator.) The same is true of *Crutcher* v. *Joyce*, 134 F. (2d) 809 (C. C. A. 10, 1943).

The instant case is, of course, a two-stage suit. The right asserted by the plaintiff as heir of Stanley Young against the Otto Young trust estate is essentially the right of Stanley Young as the owner of a vested interest. These decisions in the Fifth, Tenth, and Seventh Circuits are in direct conflict. See *supra* the comparison of facts here and in *Young* v. *Powell*.

While the above goes primarily to the question whether the other persons interested in the estate of Stanley Young were indispensable parties on the vesting question,* there

* It should be noted, however, that Stanley was an heir of Otto Young Heyworth. Hence plaintiff also claims a fractional share through the Heyworth estate or as a co-heir with the Heyworths.

is an additional reason why they were indispensable and this applies also to the persons interested in the estate of Otto Young Heyworth. This is that the suit was to establish an interest in a trust by construing a will and all persons entitled under the asserted construction have joint interests the same as in a suit to cancel or construe a contract. The case as to the Stanley Young heirs is distinguishable from the three Supreme Court decisions mentioned above, and is stronger than *Young* v. *Powell*, because it involves both (a) a suit by one of several heirs against a third person and (b) a construction of a will, as well as the determination of the right of the trustee to continue.

The decision below accordingly is also contrary to decisions of this Court holding that in a suit to cancel a contract the interests of persons occupying the same position in the contract as the plaintiff are not separable and that they must be parties even though their presence would defeat the jurisdiction. *Shields, et al.* v. *Barrow, supra*, 17 How. (58 U. S.) 130, so held with respect to a bill to set aside a compromise contract, and *Gregory* v. *Stetson*, 133 U. S. 579, so held with respect to a contract of bailment. Similarly *Commonwealth Trust Company* v. *Smith*, 266 U. S. 152, with respect to separate contracts concerning water rights. Similar decisions in the Fifth Circuit concerning mineral contracts are *Vincent Oil Co.* v. *Gulf Refining Co.*, 195 F. 434, and *Keegan* v. *Humble Oil Co.*, 155 F. (2d) 971. The Sixth Circuit held to the same effect in *Kentucky Natural Gas Corporation* v. *Duggins*, 165 F. (2d) 1011, which also held co-heirs indispensable.

The construction of a will, or trust contract or agreement, whereby a provision of the instrument creating the trust is construed in favor of one group of persons rather than another is indistinguishable from actions involving contracts generally. In neither case can the meaning or

effect of the written instrument and the obligations of the trustee or contract obligor be one thing as to some members of a group and something else as to others. (It was so held even with respect to a deed in *Young* v. *Powell.*)

In the construction of a trust instrument, as here, the court determines the ownership of property. The ownership should not be determined to the limited extent of establishing the rights of one person. The entry of a decree where some interested parties are absent cannot be a determination even of the rights of *present* parties in the fund, or between present beneficiaries and the trustee. The decision of the District Court could not properly establish as to the defendant grandchildren that they have vested interests.* In a subsequent suit in a state court with all parties present it might be held that the interests are contingent, and this decision, rather than the federal decision, would establish the status of the beneficiaries and their rights *in rem* in the trust fund or as between themselves and the trustee.

Other decisions which conflict with the decision of the Court of Appeals are *Armstrong* v. *Lear,* 8 Peters (33 U. S.) 52, *Board of Trustees of Oberlin College* v. *Blair,* 70 F. 414 (C. C. W. Va.), *Franz* v. *Buder,* 11 F. (2d) 854 (C. C. A. 8, 1926), cert. den. 273 U. S. 756, and *Baird* v. *Peoples Bank & Trust Co.,* 120 F. (2d) 1001 (C. C. A. 3, 1941), the last two cases involving a trust. Also the decision of course conflicts with decisions following state law

* Upon the death of a grandchild, such as this petitioner, without issue, the trustee could not even recognize the right of the estate of the deceased grandchild in the trust corpus. Neither this petitioner nor the other defendant grandchildren would know whether they have interests which they could assign or pledge. Upon the death of a grandchild before termination of the trust the determination of the federal estate tax and state inheritance tax will involve the question whether the interest was vested and the decree will not have been a conclusive adjudication for this purpose.

such as *Young* v. *Garrett,* 149 F. (2d) 223 (C. C. A. 8).

The decisions recognize that absent parties are indispensable when their interests are bound up with plaintiff's interest. *Roos* v. *Texas Company,* 23 F. (2d) 171 (C. C. A. 2).

With respect to personal property, the fact is that the administrator of the estate of Stanley Young would hold title or be the proper claimant to the exclusion of heirs. While plaintiff's right of inheritance is limited to realty, the distinction between realty and personalty might not operate identically for the two purposes.

**A Final Disposition Without All Parties Present as Inconsistent With Equity and Good Conscience.**

If it were assumed *arguendo* that a final decision could be entered in this case which would not affect the interests of the absent parties, it is apparent that such a decree would leave the controversy in a condition "wholly inconsistent with equity and good conscience". This is another way of saying that the parties are indispensable in that jurisdiction could not be sustained unless by the fact that the decision was favorable.

The determination of when a controversy is left "in a condition inconsistent with equity and good conscience" is inherently a question of degree; but in no case has a court sustained jurisdiction where the relief was necessarily as incomplete and fragmentary as this. The District Court would be unable even to fix the share of the plaintiff in the trust, much less to divide the property. The interest of the estate of Stanley Young in the grandfather's trust would have been fixed on Stanley's death when the remainder became indefeasibly vested. The court, however, could not even determine the plaintiff's fractional interest in the trust. In order to do so the court would not merely have to determine that Stanley died

intestate and determine the heirship of Stanley Young, but since rights of inheritance are different as to real and personal property in Illinois (the widow getting all of the personalty), the court would have to determine to what extent the interest of Stanley's estate in the trust estate was real property or personal property. This involves the further question whether the determination is to be made as of the death of Stanley, the death of Otto Young or the termination of the trust, and whether various long-term leasehold interests (involving a substantial part of the estate—R. 290-293) are real or personal property for purposes of inheritance. Naturally none of these vital questions could be determined in the absence of the other persons interested in Stanley's estate.

No case will be found where the court strained to make diversity jurisdiction available to one person in a case such as this where: (a) there is a single plaintiff and no adjudication can be made of the rights of other persons having the same claim and larger interests; (b) the court cannot determine what is distributable to the plaintiff or even establish the size or amount of his claim but can only determine for him, in the abstract, the legal proposition on which a later claim could be based; (c) the absent parties are within the jurisdiction, could easily be served, and were once parties but were dismissed by plaintiff; (d) the subject matter, the construction of future interest limitations in a will, is one particularly within the province of state courts; (e) the result will necessarily be further litigation in which an opposite result is quite likely to be reached; (f) the "status" of present parties or their rights *in rem* as beneficiaries are left uncertain; (g) additional litigation would be likely over the very question of the extent and validity of the decree.

## II.

**BY CONSTRUING THE REMAINDER INTERESTS TO BE VESTED, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT ISSUE OF LOCAL LAW IN A MANNER IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.**

The requirement of adherence to local law is applicable in the construction of wills. Where there is a direct local precedent, or a local rule of construction directly applicable, the Federal court is bound to follow it. The enforcement of this requirement rests ultimately with this Court although it necessarily involves an examination of the local law to the extent required to make certain (1) that the alleged local decision or rule existed; (2) that the rule or decision was directly applicable on the facts; and (3) that the rule has not been changed by the local courts or the decision repudiated. In the instant case only the briefest examination into local law is necessary to establish (1) and (2) and little more is required for (3).

The opinions below naturally do not appear to defy the local law, but instead misstate the applicable local rule and assert that it has been repudiated. This results from the confusion of a specific local rule, which was directly applicable, with a different and unrelated general rule.

The will of Otto Young established a large trust fund and directed the trustee to distribute 88% of the income during the term of the trust. It also directed distribution of the corpus of his trust estate at a remote future time to his grandchildren and issue of deceased grandchildren. In this connection the will provided that issue of a deceased grandchild should receive "the share which such deceased grandchild would have been entitled to receive if then living" (R. 155). While his four daughters were then at a productive age, only seven infant grandchildren had so far been born. The number of grandchildren grew

after his death to eighteen and there are now sixteen living. The question presented is whether, if a grandchild dies without issue before termination of the trust, the estate of the deceased grandchild will be entitled to be counted as a grandchild and to receive a share of the corpus on final distribution or whether instead the fund will be divided only among living persons.

During the course of the litigation the defendants conceded, and this petitioner now concedes, that Illinois follows the general rule, as stated in the Property Law Re-Statement (Future Interests, Sec. 254), that the existence of a substitutional gift to issue of a beneficiary who dies does not of itself import a requirement that the beneficiary must survive or indicate what happens if the beneficiary dies without issue. A contrary rule obtains in some states based on the fact that the existence of the gift to issue removes any practical necessity for the interest of the parent being vested, because the children of the beneficiary are protected. The Court of Appeals mistakenly regarded this as the central issue.

In some instances a will in providing for the substitutional gift to issue will state that the issue are to receive the share which the parent "would have taken if then living," or words of similar import. A different question then arises, which is whether these words create a requirement as to the parent that he must be living in order to take, the same as if they had appeared as a part of the initial words stating the gift to the parent (See Restatement, *supra*, Sec. 250). It can be argued that the words merely state a truism, or refer to actual enjoyment rather than vesting in interest, and that they should be at most one element to be weighed in ascertaining intention. The Illinois courts, however, have established and consistently followed the rule that such an expression of contingency in the gift to issue (as contrasted with a mere reference to

issue taking a "parent's share") has the effect of a direct statement of contingency in the gift to the parent and is therefore effective of itself to make the interest of the parent contingent on the parent surviving the time mentioned without regard to rules of construction dealing with the implication of a requirement of survival where none is expressed. There is no inconsistency whatever between this particular rule and the general rule mentioned in the previous paragraph, but the Court of Appeals nevertheless confused the two.

In the leading Illinois case establishing this particular rule, *People* v. *Byrd*, 253 Ill. 223 (1911), Mr. Albert M. Kales was the attorney for the parties contending for a vested construction and argued that the words "if living at her death" appearing in the reference to the share of the parent in the gift to issue should be disregarded. The Illinois Supreme Court, however, after having had the benefit of Mr. Kales' arguments, rejected them and held that the words were a direct statement of a requirement that the parent be living. Mr. Kales subsequently stated his position and criticized the decision in his text "Estates and Future Interests" (2nd ed., 1920) Sec. 521.*

The opinion below indicates that the Court of Appeals has not been persuaded by Mr. Kales to reject the rule, which it could not do, so much as it has misunderstood it.

The Court's confusion of the two rules is apparent from the fact that all of the cases cited in the opinion as either being like the *Byrd* case, but since repudiated, or as being contrary to the *Byrd* case, contained no words of contingency or survivorship in referring to the parent in the description of the share of the issue. Instead the share was described in neutral terms, usually "parent's share."

* Kales' text however recognizes the distinction between the particular rule, which is criticized in Sec. 521, and the general rule, which is discussed in Secs. 519 and 520.

The conflict between the majority decision of the Court of Appeals and *People* v. *Byrd* is obvious when the clauses in the two wills and the statements with respect thereto contained in the two opinions are laid side by side.

| Byrd | Young (de Korwin) |
|---|---|
| **Provisions in Will** | |
| (On death of wife) to testator's children. "• • • the issue of the child so dying shall take the share which his, her or their parent would have taken if living at her death." (253 Ill. at p. 226.) | (On death of last surviving daughter and youngest grandchild attaining 21 years) trust corpus to be divided among testator's grandchildren "• • • the surviving issue of any deceased grandchild • • • to receive the share which such deceased grandchild would have been entitled to receive if then living." (R. 155.) |
| **Opinion** | |
| "• • • we think that the intention of the testator is so clearly expressed • • • that it is possible to understand it without resorting to technical rules of construction. • • • The words 'if living at her death' clearly indicate that a child must be living at her death, that is, the death of the widow, in order to take under the will." (253 Ill. at p. 228.) | "We are of the opinion that this clause contains no such clear expression of the testator's intent as to enable a court to say, without resort to precedent or rules of construction, that the remainders thereby created are contingent. • • • We think the language quoted is merely descriptive of the 'share' the surviving issue of a deceased grandchild are to take and that it is another way of saying that the distribution is to be *per stirpes.*" (R. 485.) |

Thus the *Byrd* case held that the words "if living at her death" made resort to decisions establishing rules of

construction unnecessary. The Court of Appeals held precisely the opposite and decided the case on the authority of decisions not involving these words.

The *Byrd* decision states a specific though narrow rule which has arisen frequently in the construction of wills in Illinois and has been consistently adhered to by the Illinois courts. The rule was in fact applied a few years before the *Byrd* case in *Cummings* v. *Hamilton,* 220 Ill. 480 (1906), which involved different but analogous language. There the gift to issue was of the share which "would have vested in the parent if then living."

The rule has been applied and approved a number of times since 1915. It was applied as late as 1942 in *White* v. *White,* 312 Ill. App. 628, and was applied by the Court of Appeals itself in 1918 in its prior decision in *Graff* v. *Rankin,* 250 F. 150 (1918), which was not even mentioned in the opinion below. In *Graff* v. *Rankin* the phrase containing the gift to issue stated that they were "to be entitled to the same share that his or her parent would have been if then living." The court, relying on *People* v. *Byrd,* said that these words were "deemed sufficient to indicate an intent that only such children and issue of deceased children as survive the life tenant shall take." In addition the rule has been approved and the *Byrd* case cited in other Illinois cases which did not actually involve the rule such as *Fleshner* v. *Fleshner,* 378 Ill. 536 (1942).

There are basically only two reasons indicated in the opinion below for the court's refusal to apply the *Byrd* rule. One is the significance attached to *Warrington* v. *Chester,* 294 Ill. 524 (1920), which will be discussed later. The other is the confusion between the specific *Byrd* rule and the general rule as to the ineffectiveness of a gift to issue to make the interest of the parent contingent. There are two manifestations of this confusion in the opinion.

The first manifestation of the Court of Appeals' confusion of the two rules is that it regarded the *Byrd* decision as influenced by or identified with cases decided before 1915 supposedly holding that a gift over to issue makes the prior gift to the parent contingent on his surviving. The cases referred to are *Bates* v. *Gillett, Spengler* v. *Kuhn,* and *Brownback* v. *Kiester.* In these cases the reference to the parent's share in the gift to issue did not contain words of contingency. Instead the description was as follows: *Bates* v. *Gillett,* "one share"; *Spengler* v. *Kuhn,* "deceased child's share"; *Brownback* v. *Kiester,* "share of other parent". The decision in the cases was not even rested on the existence of the gift to issue. The *Byrd* decision did not cite or rely on these cases, nor in fact any other cases whatever.

Also such cases were at all times before 1915 outweighed by contrary cases.* The majority opinion itself notices three such cases, *Siddons* v. *Cockrell,* 31 Ill. 653 (1890); *Knight* v. *Pottgieser,* 176 Ill. 368 (1890) and *Northern Trust Co.* v. *Wheaton,* 294 Ill. 606 (1911). Actually, as appeared in the briefs there had been six such cases decided at the time of the *Byrd* case in 1911, including *Smith* v. *West,* 103 Ill. 332 (1882), *Orr* v. *Yates,* 209 Ill. 222 (1904), and *Pingrey* v. *Rulon,* 246 Ill. 109 (1910). The *Pingrey* and *Northern Trust* cases were decided immediately before the *Byrd* case and after any of the other cases.

The *Northern Trust* case was decided eight months before the *Byrd* case by exactly the same court and with the opinion written by the same justice. Both were unanimous decisions.

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* *Bates* v. *Gillett,* and the other two cases were suggested by plaintiff's counsel in an unwarranted, if not calculated, "confession" of adverse cases before 1915. The District Court referred to them as a minority line of cases but was in error in intimating that the *Byrd* case relied on them. The statement in the District Court opinion that some of the defendants relied on these cases or their "principle" was incorrect.

Hence, it is obvious that the *Byrd* case was decided on the language of the substitutional gift rather than the then existing case law as to the general effect of a substitutional gift to issue.

The Court of Appeals in 1918 in *Graff* v. *Rankin*, 250 F. 150, was not deceived as to the nature of the decision in *People* v. *Byrd* and followed its specific rule although the six cases holding the interests contingent had grown to nine and the supposed change of law referred to by the court in the instant opinion as having occurred in 1915 had taken place.

The second aspect of the court's confusion of the two rules is, as indicated above, the reference to numerous cases decided since 1915 as though those cases involved either the same language or the same rule as *People* v. *Byrd*. These cases again merely announced the admitted rule that the existence of a substitutional gift to issue of a deceased beneficiary does not make the interest of the beneficiary contingent on his survival. None of the cases contained words of contingency as to the parent in describing the share of his issue such as the words in *People* v. *Byrd*, "the share which his, her or their parent would have taken if living at her death", or the equivalent words in *Cummings* v. *Hamilton*, *Graff* v. *Rankin*, *White* v. *White* and in the Otto Young will.

The actual language of the cases cited by the Court may be noted for comparison: *Siddons* v. *Cockrell*, "parent's share"; *Remmers* v. *Remmers*, "shares of their deceased parents"; *McBride* v. *Clemons*, "their parent's share"; *Weberpals* v. *Jenny*, "share of such deceased child"; *Boyd* v. *Boyd*, "its or their parent's portion"; *People* v. *Allen*, "its or their parent's share"; *Smith* v. *Shepard*, "their parent's share"; *Hodam* v. *Jordan*, "the same".

The second ground for the court's rejection of *People* v.

*Byrd* is the assertion that the case is inconsistent with the later decision in *Warrington* v. *Chester*, 294 Ill. 524 (1920). This is the only instance in which the court appears to appreciate the fact that the *Byrd* case involved the words "if then living."

The language involved in *Warrington* v. *Chester* was not, as the opinion below states "substantially identical" to the language in the *Byrd* case. Neither the words "if living" in *Warrington* v. *Chester* nor any other words indicate the time referred to. This greatly weakens the inference that the words "if living" are intended to be an expression of a requirement of survivorship. Also it leaves the provision ambiguous as to whether, if a requirement of survival was intended, it would not be satisfied by the beneficiary merely surviving the testator. There is a strong preference in Illinois for construing gifts to persons "living" or "surviving" as meaning merely surviving the testator where no later time is indicated. See *Peadro* v. *Peadro*, 400 Ill. 482. This would be particularly applicable in the *Warrington* case where the gift of the remainder was worded as an immediate gift in the words "I give, devise and bequeath."

Until the instant case *Warrington* v. *Chester* had never been referred to in any later decision or any text as having any bearing on the *Byrd* rule. *Warrington* v. *Chester* did not refer to the *Byrd* case, *Cummings* v. *Hamilton* or *Graff* v. *Rankin*, even for purposes of distinguishing the language.

This is due in part to the fact that the remarks of the court in *Warrington* v. *Chester* as to the interest being vested were volunteered in the opinion as *dicta* without the point being in issue or having been argued. The *Byrd* case was not cited in the briefs. There was no question as to whether any interest was contingent on survival. There was a substitutional gift to the daughter of a deceased

beneficiary and the question was whether the share of the daughter could be charged with advances which the trustee had presumed to make to her father before his death. The court held that the share of the daughter could not be so charged, or in other words that the father had no interest which justified advances to him from the trust fund, but instead the substitutional gift was effective and the daughter took directly. For the purpose perhaps of making clear the unqualified nature of the holding as one applicable even though the father had a vested interest subject to being divested, the court volunteered the statement that the interest was in fact vested.

Aside from the gift to issue in the Otto Young will and the words "if then living" the strongest sort of case was presented for the implication of a requirement of survival as to grandchildren. It is hardly even a question of *implying* such a requirement because the will directs the trustee to distribute the trust fund to the testator's grandchildren at a remote future time and if the words are taken literally, only living persons would be "grandchildren." The testator in making a will was not thinking of specific grandchildren because only a few had then been born. The gift was to "uncertain persons" at an "uncertain time." It is also within the rule that there is a requirement of survival where futurity is annexed to the substance of the gift. Simes, Law of Future Interests, Section 351. The disposition is a class gift in a direction to divide and distribute at a future time, thus presenting the strongest case for the divide and pay over rule, which is in force in Illinois, *Thomas* v. *Pullman Trust & Savings Bank*, 371 Ill. 577, 585.

By way of contrast it may be noted that not one of the cases cited by the court involved a gift to a class contained in a direction to a trustee to distribute. Most of the cases involve a simple gift to named individuals.

Yet the Court of Appeals did not even notice that it

had before it a class gift or a case involving the divide and pay over rule. This is mentioned not for the purpose of invoking those rules on behalf of this petition but rather to make clear that there was no extraneous reason why the *Byrd* rule shall not have been applied. The court in addition to confusing the *Byrd* rule with the rule as to the effect of a gift to issue, almost seems to have assumed that the presence of a gift to issue somehow *prevents* the gift to the parent being contingent.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket Nos. 9958, 9959 and 9960, *Margaret de Korwin, individually and as Executrix of the Will of Joseph Maria de Korwin, Deceased, Plaintiff-Appellee* v. *respectively, The First National Bank of Chicago, etc., Gwendolyn Young Heyworth Koch, and Marie Julia Young Kaufman Pratt, et al., Defendants-Appellants,* and that the judgments of the Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

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FILED
JUN 1 19
CHARLES ELMORE C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

**No. 790**

GWENDOLYN YOUNG HEYWORTH KOCH,
*Petitioner,*

*vs.*

MARGARET deKORWIN, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA deKORWIN, DECEASED ET. AL.,
*Respondents.*

## REPLY BRIEF OF PETITIONER KOCH TO BRIEF OF RESPONDENT, deKORWIN, IN OPPOSITION TO PETITION FOR CERTIORARI.

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## REPLY BRIEF OF PETITIONER KOCH TO BRIEF OF RESPONDENT, deKORWIN, IN OPPOSITION TO PETITION FOR CERTIORARI.

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MAY IT PLEASE THE COURT:

This brief is filed on behalf of Gwendolyn Young Heyworth Koch in response to the brief of Margaret deKorwin in opposition to the petition for certiorari of this petitioner (No. 790) and the petitioners Pratt, *et al.* (Nos. 771, 772 and 773).

In treating the two petitions together, and erroneously referring to the "absolute resemblance" and "identical arguments" of the two petitions, respondent's brief attempts to conceal its total failure to attempt any reply to the specific charges in the Koch petition that the decision below affirmed a decree which purported to establish rights in absent parties who would not have been bound by an adverse decision and that the decision on

the merits plainly confused a specific local rule of property law which was directly applicable with a different and inapplicable general rule.

The brief ignores the substantial identity between the decrees in *Young* v. *Powell*, 179 F. (2d) 147 (C.A. 5th, 1950), where the decree purported to benefit absent parties, and in the instant case (Koch Pet., pp. 18-19, 21). The denial of certiorari in *Young* v. *Powell* on May 1, 1950 (No. 688, October Term, 1949), is not, as suggested (Resp. Br., p. 22), an answer to the instant petitions because the Court of Appeals reversed the decree in that case and its decision was manifestly correct.

**THE ASSERTION THAT THE JURISDICTIONAL QUESTION WAS SETTLED BY PRIOR APPEAL (RESP. BR. pp. 3-13).**

Respondent charges petitioners with "distortion" and "misrepresentation" and in support of the charges quotes at length from the original complaint (Resp. Br., pp. 4-6) to try to demonstrate that on the prior appeal plaintiff was claiming that the remainder interest of Stanislaus deKorwin (Stanley Young) was vested and that a portion of it passed to plaintiff by inheritance. Respondent's contention in this regard is wholly spurious.

In neither the original complaint nor the amended complaint was there any suggestion that plaintiff was suing as an heir of Stanley Young to establish the existence of a vested interest in Stanley as a deceased grandchild of Otto Young.* This is obvious from a reading of both com-

* The original complaint had named the five "absent parties" as defendants (Ruth Jacobi Young, individually and as administratrix, Evelyn Heyworth, Lawrence Heyworth, and Lawrence Heyworth, Jr.). When the issue was raised that a proper realignment of parties destroyed jurisdiction, plaintiff attempted to correct the defect by seeking to file an amended complaint which eliminated them as parties. Thereupon the trial court dismissed the case. Hence the right to proceed on the amended complaint was the point at issue on the first appeal.

plaints, as distinguished from respondent's selected quotations, and from an examination of the prayers for relief. On the contrary, all claims in both the original and amended complaint were premised on the express averment that the will provided for ultimate distribution of corpus "among all living grandchildren and the issue of any deceased grandchildren" (Stip. R. 480-481; R. Oct. term, 1946, No. 696, pp. 10, 13, 135, 139). This is wholly inconsistent with the theory first injected in the second amended complaint and upon which the case was tried, *i. e.*, that grandchildren had a vested interest, transmissible to their heirs upon death without issue (R. 142, 298).

Both complaints contained in paragraph (3) of Count II the language appearing on page 5 in which plaintiff was seeking to qualify as "one of the surviving issue, in the liberal, broad sense of the term, of a deceased grandchild" under the gift over to issue of deceased grandchildren. While the dubious claim (later abandoned, R. 132-148) that the word "issue" should be construed to mean "heirs" (thus making the original plaintiff an "issue" of his son) was only an incident to the principal claim that the will violated the rule against perpetuities, there is a critical difference between such a claim and a claim of a vested interest. If plaintiff took as "issue" he would take a fixed share of the trust in his own right as a beneficiary under the provisions of the Otto Young will. On the other hand, if the plaintiff took by inheritance on a vested theory, his claim would be essentially the claim of the deceased grandchild's estate, or derivative. Such a claim, like the claim in *Young* v. *Powell,* is, as pointed out in the Koch petition (p. 21), a two-stage claim, as distinguished from the facts involved in the various cases cited in respondent's brief (pp. 18-25) where the interests of co-heirs, co-beneficiaries or tenants in common were held separable.

There is therefore no substance whatsoever in plaintiff's

contention that the theory of the *second* amended complaint upon which the case was tried was merely a clarification of the prior allegations contained in the original complaint and the amended complaint (Resp. Br., p. 7), and therefore was before the court on the first appeal.

The question involved on the prior petition for certiorari was different for the further reason that the case at that time was up on the pleadings and no decree had been entered extending benefits and giving relief to absent parties in direct conflict with the decision in *Young* v. *Powell, supra.*

Even if respondent's ultimate theory were identical with its theory on the prior appeal, it would furnish no answer to the present petition, for the denial of the prior petition for certiorari was not an adjudication of the jurisdictional question by this Court. That the jurisdictional question is open for consideration after the trial of the case is demonstrated by this Court's decision in *Indianapolis* v. *Chase National Bank,* 314 U. S. 63 (1941), where the court granted certiorari and found that there was no jurisdiction after a trial on the merits, following a previous denial of certiorari on the jurisdictional question.

**Respondent's Claim of Estoppel.**

Equally without merit is respondent's apparent contention that petitioners allegedly agreed to plaintiff's shift to the vested theory set forth in the second amended complaint and that they are therefore foreclosed from now making any claim as to its effect on the jurisdictional question (Resp. Br. pp. 7-8). The order of June 18, 1949, to which respondent refers expressly provided that in defendants' respective answers to the second amended complaint any defenses theretofore raised and overruled need not be repeated as such defenses would be available to the

defendants in like manner and to the same extent as if pleaded over (R. 131). Furthermore, the answers of petitioners expressly preserved the defense of lack of jurisdiction (R. 186, R. 195, 199-200). Similarly, the petitioners assigned as error the lack of jurisdiction and the omission of indispensable parties and included the point in their briefs (R. 455, 465).

**The Matter of the Petition for Rehearing.**

There was no necessity for the filing of any petition for rehearing and the fact that the petition for rehearing which was filed was directed to the vested question (Resp. Br., p. 8) can in no way deprive the petitioners of the right to present the jurisdictional question as a basis for the granting of a writ of certiorari to clarify the conflict in the cases which now exists.

**The Matter of Illinois Citizenship.**

Respondent attempts to assert a technical failure of the record to show the Illinois citizenship of the persons having joint interests with plaintiff, *i. e.*, Ruth Jacobi Young, Evelyn Heyworth, Lawrence Heyworth and Lawrence Heyworth, Jr. (Resp. Br., pp. 9-10). Plaintiff failed to allege the citizenship of these persons when they were originally made parties. They were omitted from the affidavit of nonresidence filed by Mr. Aiken, plaintiff's attorney. All were apparently personally served and they appeared by their respective counsel and filed answers to the complaint (Stip. R. 480-481; R. Oct. term, 1946, No. 696, pp. 3, 32-33, 76, 95). When jurisdiction was challenged on the ground of their Illinois citizenship, plaintiff sought to dismiss them as parties. If they were not citizens of Illinois, there would have been no jurisdictional question on their realignment and there would have been no occasion for plain-

tiff to attempt to dismiss them as parties and to take the first appeal herein on the issue of their being indispensable parties.

Furthermore, in the case of the estates of the two deceased beneficiaries, administered in Illinois, the administrators would have to be Illinois citizens as respondent admits (Br., p. 9), and it is therefore immaterial that Ruth Jacobi Young, *ex parte* as far as this case is concerned, may have given up the administration of Stanley's estate some time after this suit was started because she was then supposedly "a citizen of Connecticut," as respondent states without benefit of record support.

The respondent does not seem to realize that if the absentees were not Illinois citizens, it would be elementary that the court could not have proceeded in their absence. The decision of the Court of Appeals on the first appeal, was, of course, predicated on the assumption that the absent parties were Illinois citizens but that since their presence would defeat the jurisdiction and the court could give limited relief in their absence, they were not indispensable. (*deKorwin* v. *First National Bank, et al.*, 156 F. (2d) 858).

**THE ASSERTION THAT ALL PARTIES IN INTEREST ARE BEFORE THE COURT BECAUSE OF THE CLASS SUIT ALLEGATION (RESP. BR. pp. 13-17).**

The assertion that four to six persons, as the case may be, constitute a class of persons so numerous that it is impracticable to bring them before the court is ridiculous. The fallacy of the contention is emphasized when it is considered that originally all four of the "absent" individuals were named as parties defendant and three of them had entered their appearance in the case (Rec. on prior pet. for cert., pp. 76, 95).

Plaintiff's contention falls with a mere statement of the

rule as laid down by this Court in *Hansberry, et al.* v. *Lee, et al.*, 311 U. S. 32 (1940), where it was stated (p. 41):

> "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree."

The argument was of course rejected by the Court of Appeals in the first appeal in its holding that the absent parties were not indispensable since limited relief could be given (156 F. (2d) 858). If the parties in question were present by representation the relief would not have to be limited. The parties would be before the court and their rights could be determined or annulled.

In the assignments of errors petitioners charged lack of jurisdiction and absence of indispensable parties. If the trial court's opinion expressed the erroneous impression that absent parties were before the court by representation (Resp. Br., p. 15) and had it been necessary to specify this as error, the above assignments were a proper way of doing so assuming, as respondent asserts, that the existence of a class suit would cure the lack of diversity of citizenship and of indispensable parties.

Realizing that a case involving 4 or 6 so-called represented parties is far removed from the class suit doctrine, respondent argues that the class is potentially larger because other grandchildren might die without issue before the death of Mrs. Pratt (Resp. Br. p. 16). But the claim that grandchildren have vested or transmissible shares in the trust necessarily means that it is the grandchildren themselves who would have an interest and not their heirs or legatees. All of the fourteen living grandchildren were made parties-defendant and, consequently, were not represented by plaintiff. Eight of them appeared in the suit and took a position hostile to plaintiff and this action would be more fairly representative of the six not appearing than would plaintiff's claim.

**THE ASSERTION THAT THE ABSENT PARTIES ARE NOT INDISPENSABLE (RESP. BR. pp. 17-25).**

This topic of the respondent's brief (III) is the only portion which attempts to meet the petitions on the merits of the jurisdictional point. Yet it completely passes over the showing that the decision below is in conflict with *Young* v. *Powell* and other decisions in approving a decree that gave relief to absent parties (Koch Pet. pp. 15-19).

As previously noted, respondent also overlooks the fact that the plaintiff's claim was not simply a claim of one of several tenants in common or co-heirs, but was a two-stage claim by one heir asserting the ownership of his decedent or ancestor in the absence of other persons interested *in that same ownership* (See Koch Pet. p. 21). In this respect the claim is like that involved in *Young* v. *Powell* but unlike the numerous cases cited by respondent. The situation is different from a claim by one person to an interest in a trust in the absence of other persons having a similar claim. The other persons here do not have

merely similar claims but are participants in what is really the single claim of a deceased trust beneficiary, being participants in the estate of that deceased beneficiary.

The respondent (Resp. Br. p. 22) asserts that *Payne* v. *Hook,* 74 U. S. 425 and *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U. S. 33, which held co-heirs not indispensable, were distinguished by the court in *Young* v. *Powell* on the ground that "the plaintiff in the *Powell* case was endeavoring to enforce 'an indivisible right' of rescission." The fact is that the court in *Young* v. *Powell* did not distinguish these cases on the ground that rescission was involved but instead asserted the very distinction made in the preceding paragraph and in the Koch petition, saying that the plaintiff was enforcing "an indivisible right of an estate or of his co-heirs" (179 F. (2d) at p. 150). Respondent has in effect misquoted the court. *Young* v. *Powell* did not involve rescission of a contract but rather the recovery of $44,000 and certain real estate. It is submitted that the court noted the analogy to cases involving rescission primarily because the plaintiff was asserting the right of a decedent or of an estate which was an indivisible right.

Similarly in the instant case plaintiff was asserting that Stanley Young had a vested interest so that an interest in the Otto Young trust was an asset of Stanley's estate. The interest of Stanley or his estate could hardly be held to exist as to some persons interested in the estate and not as to other persons, just as a contract could hardly be held rescinded as to some parties and not as to others. It is not necessary to go beyond this in order to establish a conflict between the decision below and the decisions in *Shields* v. *Barrow,* 17 How. (58 U. S.) 130 and other rescission or contract cases.

Actually, however, there is no justifiable distinction between the construction of a trust instrument in such a

case as this, where the number and size of the shares is at issue, and the construction or rescission of a contract as far as the necessity of having all interested persons before the court is concerned. There is no more reason why the obligations of a trustee under the instant circumstances should be permitted to be declared as to some but not all persons than that the rights of contract obligors generally should be so declared.

Respondent's statement (Resp. Br. p. 20) that plaintiff had the right to omit even persons in the petitioners' position shows respondent's misunderstanding of this case and of the difference between it and the cases cited. In any suit raising the vested question in which grandchildren of Otto Young or the heirs or representatives of deceased grandchildren are omitted as parties (assuming in the case of deceased grandchildren that the decision could not validly be *res judicata* in favor of the absentees) a decision whether for or against the plaintiff would create an impossible situation because it would not be a decision *in rem* or one binding as between the defendants or as against absent parties (Koch Pet. p. 23). If the decision were the other way in a later suit, the trustee would be under inconsistent orders as to the character of the remainder interests and as to the number of shares in which the fund should be divided on termination of the trust. Respondent's suggestion (Resp. Br. p. 25) that this should be disregarded because the trust has not yet terminated and the evil day is in the future is obviously without merit.

The jurisdictional question cannot be disposed of by respondent's sweeping generality that "the rights of persons to participate in a trust fund, or an estate, founded upon their status as heirs, next of kin, legatees or devisees, or *cestuis*, are separable and divisible" (Resp. Br. p. 18).

They may be and they may not be, depending upon the facts and the rights being asserted, as demonstrated by cases previously cited (Koch Pet. pp. 23-24).

**THE ALLEGED FEDERAL QUESTION (RESP. BR. pp. 25-27).**

While there is actually no federal question involved in the case, it may be noted that the existence of a federal question would not confer jurisdiction to proceed in the absence of indispensable parties nor to enter a decree giving relief to absent parties. Even if the existence of a federal question may possibly have been germane on the first appeal (before the Illinois citizens were dismissed out), on the theory it might have cured the lack of diversity jurisdiction, for present purposes it cannot help respondent. (Actually if there were a federal question and this eliminated problems of citizenship, it is obvious, as hereinbefore shown, that the presence of the missing parties would be indispensable.)

There is no federal question involved, and this was recognized by the Court of Appeals on the first appeal. The question on the trusteeship point is a matter of the construction of the will and of local law. The first consolidation involved two state banks. If this consolidation was not effective to pass the trusteeship the second consolidation with a national bank is irrelevant. If the first consolidation passed the trusteeship, the only possible federal question would be whether the McFadden Act permitted the national bank to take over the trusteeship the same as if the consolidation had been with a state bank. This "question" was settled in *Ex Parte Worcester County National Bank*, 279 U. S. 347, 359-60 (1929) where the court upheld the constitutionality of the Act on the ground that it was not directory or compulsory but merely permissive,

and validly so, in the sense of authorizing the succession to trusteeships where permitted by state law. That being so it was no longer a basis for federal jurisdiction. *Water Service Co.* v. *Redding*, 304 U. S. 252, 255 (1938).

**THE FUTURE INTEREST QUESTION (RESP. BR. pp. 28-33).**

Nothing in *Spiegel* v. *Commissioner*, 335 U. S. 701 (1949), alters the proposition that the decision of an important issue of local law in a manner in conflict with local decisions remains as one of the grounds for the issuance of the writ. If any inference as to the correctness of the decision is to be drawn from the personnel of the court (Resp. Br. pp. 28-29), it should be noted that of the two Illinois lawyers on the Court of Appeals, Finnegan, J., who dissented on the vested-contingent question, had recently been appointed to the court after long experience as a chancellor hearing equity cases in Cook County.

It is noteworthy that the entire remainder of this portion of the brief consists of quotations from the opinions below without any attempt to support the opinions independently. Respondent's brief is devoid of any attempt to answer the clear showing in this petitioner's petition that it is obvious from the majority opinion of the Court of Appeals, when compared with the cases cited, that the court misunderstood the cases and confused a specific rule which was directly applicable with a different though related general rule.

The errors in the two opinions quoted by respondent have been sufficiently pointed out in the petition (Koch Pet., pp. 26-35). The District Court's statement that only New York cases were cited in *People* v. *Byrd* is only partially corrected by the observation of the Court of Appeals that the court in the *Byrd* case held the law of the two states to be the same. The fact is that the Illinois

Supreme Court in establishing the rule applicable here held that the phrase in question was a clear expression of meaning and that resort to decisions was unnecessary and the citation of New York cases was only to show that there was nothing to the contrary in the law of New York.

## RESPONDENT'S CONCLUSION.

Under the heading of "Conclusion" respondent (Br., p. 34) makes some additional jurisdictional arguments based largely on the Federal Rules of Civil Procedure, which, of course, do not extend or limit jurisdiction (Rule 82).

Respondent erroneously starts with the premise that Rule 21 provides that a nonjoinder of parties is not ground for dismissal of an action. The rule, which is only effective as declaratory of the law, does not provide that failure to join indispensable parties is not ground for dismissal. It refers to misjoinder rather than nonjoinder.

Respondent refers to the separate enumeration in Rule 12(b) of "lack of jurisdiction over the subject matter" and "failure to join an indispensable party." Reference is then made to Section 2105 of the Judicial Code providing that there shall be no reversal for error in ruling upon matters in abatement which do not involve jurisdiction. From this, respondent argues that even if the chancellor erred in his ruling upon the failure to join indispensable parties, such error could afford no basis for reversal in this Court.

Obviously the fact of separate enumeration in the rules is not incorporated in any way in Section 2105 of the Code and is not a guide to its interpretation. It is well established law that even where the point was not made at all in the court below, it is the "duty of the appellate court • • • to reverse and remand a case where indis-

pensable parties are missing." *Flynn* v. *Brooks*, 105 F. (2d) 766, 767 (C. A. D. C., 1939). Failure to join an indispensable party is a jurisdictional defect and this is true *a fortiori* where the citizenship of the absent indispensable parties destroys diversity jurisdiction, in which case there is not only a lack of jurisdiction for want of indispensable parties but a lack of diversity jurisdiction.

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This petitioner renews her prayer for review of the above entitled causes by issuance of the writ for certiorari.

Respectfully submitted,

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